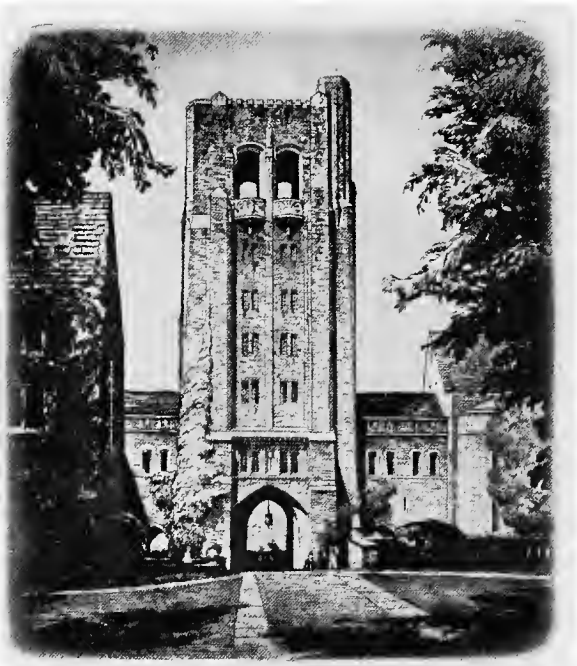

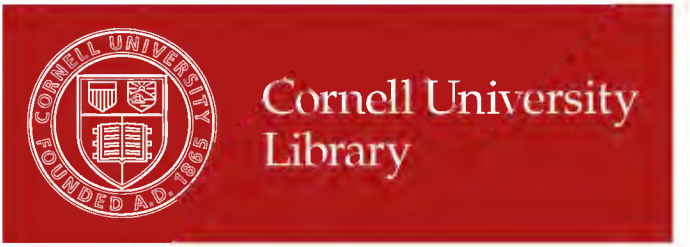

HOME LAW SCHOOL SERIES No. 4

Contracts and Partnership

CONTAINING

ALL THE ESSENTIAL ELEMENTS NECESSARY TO MAKE A COMPLETE AND BINDING CONTRACT, TOGETHER WITH A FULL EXPLANATION OF THE LAW OF PARTNERSHIP, WITH MANY FORMS OF BOTH CONTRACTS AND PARTNERSHIPS

BY

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AUTHOR OF "THE HOME LAW SCHOOL SERIES,"
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CHICAGO
FREDERICK J. DRAKE & CO.
PUBLISHERS

PREFACE.

Previous numbers of the Home Law School Series having met with nothing but success and approval, the author feels disinclined to apologize for attempting to give within the limit of 200 pages the principles of the two important branches of Contract and Partnership. He does not expect that the reader or student will find in the present book all that is contained in the well-known text-books upon these subjects. Nor is he ready to admit that a larger or more comprehensive book is desirable to answer the purpose intended by the volumes of the Home Law School Series. It is only the aim and purpose of the Series to furnish in convenient and inviting form the principles and elements of the American law.

Under the head of Contracts it has not been attempted to discuss the various special contracts, which are now considered as distinct legal subjects. Sales, Bailment, Negotiable Instruments, Agency, etc., will be treated in later numbers of the Series. The discussion has been limited to the method of making a complete and binding contract, with a consideration of the essentials of such a contract; determining the effect of

such a contract when made; the method of interpreting or construing the terms of the contract; and, finally, when and how the contract is terminated. The same general plan has been followed in treating the subject of Partnerships. That no great space is necessary for such a consideration of these subjects is evident.

Believing and hoping that the elementary principles herein presented will be of service and benefit to that large class of men who desire to know the common principles of law applicable to their daily business, and to students-at-law in preparing to enter a profession, which is best understood when actually entered upon, the author submits his work without further comment.

CHARLES E. CHADMAN.

ABBREVIATIONS.

(See also the abbreviations given in previous numbers.)

Abb. Pr.—Abbott's Practice Reports, N. Y. Courts.

Add. Cont.—Addison on Contracts.

Ala.—Alabama Reports.

Alb. L. J.—Albany Law Journal.

Am. ed.—American Edition.

Am. L. Reg.—American Law Register.

App. Cas.—Appeal Cases. (Eng.)

Ark.—Arkansas Reports.

Barb. Ch.—Barbour's Chancery Reports, N. Y. Chancery.

B. & Ald.—Barnewall and Alderson's Reports, Eng. King's Bench.

B. & C.—Barnewall and Cresswell's Reports, Eng. King's Bench.

B. & S.—Best and Smith's Reports, Eng. Queen's Bench.

Beav.—Beavan's Reports, Eng. Rolls Court.

Cont. or Contr.—Contracts.

C. B.—Common Bench Reports, Eng.

C. P. D.—Common Pleas Division Reports, Eng.

C. J.—Chief Justice.

Contra.—To the contrary.

Ch. App.—Chancery Appeal Cases, Eng.

Dill.—Dillon's Reports, U. S. Cir. Ct.

D. & J.—De Gex and Jones' Reports, Eng. Chancery.

East.—East's Reports, Eng. King's Bench.

E. & B.—Ellis and Blackburn, Eng. Queen's Bench Reports.

Exch.—Exchequer Reports, Eng.

Fed. Rep.—Federal Reporter, U. S. Courts.

Ga. or Geo.—Georgia Reports.

Grat.—Grattan's Reports, Virginia Courts.

H. Bl.—Henry Blackstone's Reports, Eng.

H. L.—House of Lords Cases, Eng.

H. L. Sc. App.—House of Lords Scotch Appeal Cases, Eng.
Hill.—Hill's Reports, N. Y. Court.
Hun.—Hun's Reports, N. Y. Sup. Ct.
Ia.—Iowa Reports.
Idem.—The same.
J.—Judge or justice.
J. Parsons, or J. Pars.—James Parsons.
J. & H.—Johnson & Heming's Reports, Eng. Chancery.
Johns. Cas.—Johnson's Cases, N. Y. Sup. Ct. & Ct. of Errors.
L. R.—Law Reports, Eng.
La. Ann.—Louisiana Annual Reports.
Metc.—Metcalf's Reports.
M. & S.—Maude & Selwyn's Reports, Eng. King's Bench.
N. J. L.—New Jersey Law Reports.
Nor.—Norris' Reports, Pa.
N. H.—New Hampshire Reports.
N. S.—New Series.
N. W. Rep.—North Western Reporter.
O. St.—Ohio State Reports.
Ohio C. C.—Ohio Circuit Court Reports.
Oreg.—Oregon Reports.
Part.—Partnership.
P., or pp.—Page or pages.
Pa. St.—Pennsylvania Reports.
Q. B. D.—Queen's Bench Division Reports. Eng.
Roll. Abr.—Rolle's Abridgment.
R. I.—Rhode Island Reports.
S. C.—Same Case, used for duplicate citation.
Sergt. & R.—Sergeant & Rawle's Pa. Reports.
South.—Southard's Reports. N. J.
U. S. Cir. Ct.—United States Circuit Court Reports.
Vt.—Vermont Reports.
W. Va.—West Virginia Reports.
Wm. Bl. William Blackstone's Reports. Eng.
Wr.—Wright's Reports, Pa.

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INTRODUCTION.

THE SUBJECT OUTLINED AND DEFINED.

Sec. 402. IMPORTANCE OF CONTRACTS IN SOCIETY.—The subject of Contracts is pre-eminently the most important and far-reaching branch of the municipal or positive law. "Indeed," says Professor Parsons, "it may be looked upon as the basis of human society." In a state of wild or savage nature, each man was at war with all other men; presumably by a gradual evolution men came to make voluntary or involuntary compacts and agreements with each other, by which each recognized the existence and rights of others in consideration that his own existence and rights be in turn recognized by all the rest. In some such manner were social relations established. By the same process—agreement—have arisen the multitude of relations which exist between individuals; so that in almost every phase of human life, in the state, the community and the family, in business and pleasure, contracts, and the law of contracts, are of the utmost importance.*

*Almost the whole procedure of human life implies, or, rather, is, the continual fulfillment of contracts." 1 Pars. Conts. 1.

Sec. 403. PURPOSE OF THE LAW OF CONTRACTS.—Rules of law regulating and enforcing contracts are made necessary because men, when they have made a contract, are not always ready and willing to carry it out; also from the fact that unrighteous and immoral contracts are made, and these it is to the common good to be declared void, while those which are valid and just should be enforced by proper sanctions. If all contracts or agreements between man and man were clearly made, and honestly fulfilled, there would be little need of regulating principles of law. But some men are dishonest and unfair in dealing with their fellow men, and all are liable to make mistakes and errors. Hence the law may at one time coerce performance, and again restrain a party from demanding the fulfillment of a contract. The law aims to lay down certain general characteristics and demand that all contracts be brought within their scope if they are to be legal and enforceable. These principles or characteristics prescribed by the law are the developed and practical expedients believed to be necessary to secure justice and fair-dealing between man and man in the employment of the important right of contract.

Sec. 404. SAME SUBJECT—IMPLIED CONTRACTS.—It is not always convenient for contracting parties to express clearly and fully the terms of the contract between them. In such cases the law has to step in, and by rules or principles of construction and interpretation declare from the situation of the parties what should, and what should not, be implied

between them. These general rules, gradually evolved by impartial and experienced men—judges—are presumed to be known and understood by the contracting parties, and to be acquiesced in by each, and this presumption is not to be varied. These equitable terms which the law adds to the situation of the parties creates an "implied contract," defined by Blackstone as, one which reason and justice dictates, and which, therefore, the law presumes that every man undertakes to perform. (11 Bl. Com. 443.)

Sec. 405. CONTRACT DEFINED.—A contract is an agreement between two parties, resulting in an obligation or legal tie, by reason of which one party is entitled to have certain stipulated acts performed or forborne by the other.*

The word "contract" is the term now commonly used to denote that one person is bound to another to do or render something, and that a duty is imposed as well as a right conferred, though "obligation," "agreement," "covenant," and "promise" are sometimes used in the same sense. In the Roman Civil

*There are many definitions of a contract. "A contract is an agreement, upon sufficient consideration, to do a particular thing." (2 Bl. Com. 446.) "A contract is an agreement in which a party undertakes to do, or not to do, a particular thing." (Marshall C. J., in Sturges v. Crowningshield, 4 Wheat. 197.) "An agreement enforcable at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others." (Anson Conts. 9.) According to the etymology of the word, from "contraho," a contract is a drawing together of the minds of the parties until they meet in agreement. (Mcnulty v. Prentice, 25 Barb. 204.)

Law, "obligation" was the term used to designate all the rights and liabilities which we term "rights in personam," or the rights which one person has to acts or forbearances from others. Here, as in all contractual relations, two parties are necessary, as a contract or obligation with one's self is a mere nullity. (Faulkner v. Howe, 2 Exch. 595.)

Sec. 406. ESSENTIALS OF THE DEFINITION.—The essential things to be considered in every contract are: The agreement, the parties, the consideration, and the subject matter, or the thing to be done or omitted. (Fuller v. Kemp, 138 N. Y. 231.)*

The agreement, or assent of the parties to the terms of the contract, need not be a union of the two minds, but simply a union of the manifest thoughts or purpose of the contracting parties. So in implied contracts, we shall see that this assent is conclusively presumed to exist as to all such features as the judge or legal expert thinks reasonable to the situation and surroundings of the parties. The consideration is the reward or inducement which engages one or the other to enter into the contract. The parties must be two or more in number and competent to contract. The subject matter of the contract may be as varied as the ne-

*"To constitute a contract, there must be parties capable of contracting, consent, a lawful object, and a sufficient consideration; and the consent must be free, mutual and communicated by each to the other and must not be induced by fraud, undue influence or mistake, else it is not free and the contract may be rescinded." (Beach on Cont. Sec. 1; Loaize v. Supr. Court, 85 Cal. 11.)

cessities of human life; so that it is the few things disallowed as subjects of contract that are to be mentioned, and not those that are allowed. Each of these essential elements will receive attention in the subsequent sections.

Sec. 407. CLASSIFICATION OF CONTRACTS.—The word "contract" is used by the profession to designate every description of agreement or obligation, whether verbal or written, with or without seal, by which one party is bound to another to perform or to omit to perform a stipulated act. In this most general sense, contracts may be classified as, (1), contracts under seal, or specialties; and (2), simple contracts.

(1). Contracts Under Seal. Contracts under seal, also called specialties, have been of greater significance in the past than they are at present. The seal, or solemn execution of the contract, imported the assent and intention of the parties to which the court gave effect. At first the form in which the intention was manifested was of more importance than the consideration, and the rule still prevails that a deed, or contract under seal, requires no consideration. Now that consideration has become of more importance than form, it is said that the presence of the seal implies a consideration. See Anson on Contracts, Part II., Ch. 2.

(2) Simple Contracts. All contracts not under seal, whether in writing or verbal, are called simple or parol contracts. There being no distinction between verbal and written contracts as regards validity, save where

the Statute of Frauds requires certain contracts to be in writing to be valid. (Beckham v. Drake 9 M. & W. 92.)

Sec. 408. SAME SUBJECT—EXPRESS AND IMPLIED CONTRACTS.—Contracts are further divided into express and implied contracts.

Express contracts are those which are openly uttered in detail, or are reduced to writing so that the terms are known to each of the contracting parties, as an agreement to sell stated goods at a stated price.

An implied contract, as we have seen in Section 404, arises when the parties have not openly stated the terms, but justice and honesty require that a contract should exist between them, as where one party has rendered the other service, or furnished him goods; here an implied agreement arises that the party benefited is to repay the other what such services or goods are reasonably worth.

In general, the only distinction between express and implied contracts is in the mode of proof. An express contract is proved by evidence of the words used, and by a rule of evidence, when the words of the contract are in writing and definite, oral testimony will not be admitted to contravene or vary them. In implied contracts the intention of the parties is determined by proving the facts and circumstances surrounding them, and adding those terms which justice and honesty require from parties in such circumstances. But when contracts are established in either of these ways, they are of the same validity and effect, and the consequences of a breach are the same.

Sec. 409. SAME SUBJECT—EXECUTED AND EXECUTORY CONTRACTS.—A contract that is fully performed on both sides is said to be "executed." While a contract under which nothing has been done is "executory." Contracts may be part performed and part unperformed, that is, both executed and executory in part. (2 Bl. Com. 443; Fletcher v. Peck, 6 Cranch, 87, 136.)

Sec. 410. SAME SUBJECT—OTHER CLASSIFICATIONS.—A contract consisting of mutual executory promises is said to be "bilateral," as in the executory contract of sale, where one is bound to buy and pay the price, and the other to deliver the thing sold. Where the consideration is executed on one side and executory on the other, the contract is said to be "unilateral," as where an option is given to buy or sell. (Leake on Contracts, 18.)

A contract is said to be aleatory or hazardous when the performance of its object depends on an uncertain event, as in the contract of insurance. A contract is certain when the thing to be done depends on the will of the party, or when it must happen in the usual course of events. See Louisiana Code, Secs. 1766-76.

Sec. 411. METHOD OF PRESENTING THE LAW OF CONTRACTS.—Authors differ in their method of treating the subject of contracts. We prefer to follow the plan adopted by Sir William Anson, in his Principles of the English Law of Contract, and treat, First, of the formation of a valid contract, and its essential elements; Second, the effect or operation of contract; Third, the interpretation of contract, or

the rules of construction followed when presented to the court for decision; and, Fourth, the discharge of the contract, or the final solution of the legal tie between the contracting parties. A chapter will be devoted to each of these topics. See Anson on Contracts, p. 1.

Sec. 412. AUTHORITIES ON THE LAW OF CONTRACT.—Among the numerous English text-writers on the subject of Contracts, may be mentioned Chitty, Addison, Pollock and Anson. The works of these authors have been published with American notes, and are standard authorities at this time. Of the American authors on the subject, we mention Story, Parsons, Metcalf, Wharton, Bishop and Beach. The last author, Beach, has compiled a most useful and valuable two-volume work on "The Modern Law of Contract," and has taken pains to digest late American cases.

CHAPTER II.

THE FORMATION OF A VALID CONTRACT.

Sec. 413. ELEMENTS OF A VALID CONTRACT.—As we have seen in Section 406, the essential elements of a valid contract are: 1. Agreement, or the mutual and genuine concurrence of the parties in the thing to be done or omitted, usually indicated by offer and acceptance. 2. Consideration, or the inducement which marks the agreement as one justly entitled to be an act in the law. 3. Parties with capacities to contract. 4. A subject matter not illegal or opposed to public policy. Where all of these elements are present a valid and enforceable contract is created. The effect of the absence of any one of the four requisites will be noted as we proceed to discuss them in their order.*

I.—AGREEMENT.

Sec. 414. WHAT IS MEANT BY AGREEMENT?—Agreement, in its popular and most general sense, means no more than concord; the concurring of two minds in the same opinion or purpose. In this sense the term does not imply any exchange of promises, or a consideration influencing the agreement; there is a mere mutual assent, or concurring views. (Sage v. Wilcox, 6 Conn. 81; Abbott's Law Dict., "Agree.")

*See Anson on Contract, p. 10.

But when the word is used in reference to a mutual arrangement for determining future acts of the parties, agreement "means a meeting or concurrence of minds upon a course to be taken; a concord established by reciprocal promises or by compensating a promise. Also, secondarily, agreement designates the language, oral or written, embodying mutual promises. In this use of the word it is nearly equivalent to the verb and noun 'contract.'" (Abbott's Law Dict. "Agree.") As a result of these uses of the word, it is disputed whether or not agreement imports a consideration.* Abbott states the true view to be "that it (agree) properly imports more than promise, followed by assent; it implies reciprocal promises, though not necessarily promises which would form a legal consideration." (Law Dict. "Agree.")

Sec. 415. NATURE OF THE AGREEMENT OR ASSENT OF THE PARTIES.—In general, the agreement or assent of the parties must be a mutual willingness to enter upon and be bound by an understood bargain. There is no contract unless the parties so assent to the same thing and in the same sense. But this does not necessitate a union of the secret thoughts and intention of the parties; it is sufficient if there be

*"Agree no more implies a consideration than the word promise." (Newcomb v. Clark, 1 Den. 226; Sage v. Wilcox, 6 Conn. 81.)

"Agreement is more comprehensive than promise; signifies a mutual contract, on consideration, between two or more parties. A statute (of frauds) which requires the agreement to be in writing includes the consideration." (Wain v. Walters, 5 East, 10; Andrews v. Pontue, 24 Wend. 285.)

a plain request on the one side and an assent on the other. All that is necessary is a manifest outward assent of the parties to the same thing in the same general sense. (1 Pars. Cont. 475.) This assent or agreement usually originates from question and answer, that is, offer and acceptance. Thus A says to B, "I will sell you my horse for $50." B replies, "I accept your offer." By this offer and its acceptance the assent of the parties is manifested and the spoken words conclude both from denying that they did so assent.

Sec. 416. ACCEPTANCE NECESSARY TO COMPLETE THE ASSENT.—When a proposition has been communicated by one party to another it must be accepted, and the acceptance communicated, or put in a proper way to be communicated, to the maker of the offer in order to form a union of mind necessary to agreement. The acceptance of the terms of the offer must be as full and complete as they were made. There must be no reservations, or adding of conditions by the acceptor; the offer must be accepted or rejected in toto. So if an offer be made to a person by mail or otherwise, to sell a certain horse for $50, a complete acceptance of such an offer might be made by the reply "Yes;" but if the answer should be "Yes, if you will warrant him," there is a change or qualification of the offer which is not an acceptance, but a refusal of the offer as made, and the submission of a new offer to the seller, which he may accept or reject.*

*1 Pars. Cont. 476; Sawyer v. Brossart, 67 Iowa, 678; Baker v. Holt, 56 Wis. 100; Fenno v. Weston, 31 Ver. 345.)

Sec. 417. HOW ACCEPTANCE MAY BE MADE.—The acceptance of an offer may be by express words or by conduct. Where an offer is made and neither accepted nor rejected expressly, but the party to whom the offer is made proceeds in the matter and derives profit or benefit from it, or asserts rights over the thing in regard to which the offer is made, here the offer is held to be impliedly accepted. Where some particular thing is to mark the acceptance, a doing of this thing completes the contract, as where a letter asked if goods would be supplied at a certain price, and stated that if they would the first cargo was to be shipped on receipt of letter. A shipment of the cargo was held to complete the contract.*

In general, an offer cannot be made in such terms that an acceptance will be assumed without communication, as if a letter making an offer should state that if no reply was received an acceptance would be assumed. The burden of writing a refusal cannot be thus put upon a party. (Felthouse v. Bindley, 11 C. B. N. S. 689.) But a comparatively recent case holds that a proposal may be made under such circumstance as not by necessary implication to call for a reply in acceptance. (Fry v. Franklin Ins. Co., 40 O. St., 108.)

Any fraud on the part of the offerer in getting the acceptance will void the contract. Where the party to secure the signature to a note read less interest than the note was written for, this was held to void the contract. (Stacy v. Roos, 27 Tex. 8.)

*Beach, on Contracts, 57; Storm v. U. S. 94 U. S. 76.

Sec. 418. AN OFFER IS REVOCABLE UNTIL ACCEPTED.—Any offer without consideration may be withdrawn at any time before acceptance, but in the case of an offer communicated by mail, the offer is considered as being repeated every instant of time until the letter has reached its destination, and the correspondent has had a reasonable time to answer it. (Dunlap v. Higgins, 1 H. L. Cas. 381.) If the offer is not retracted it remains in force until the time for acceptance or rejection has arrived. It may be retracted before acceptance, but the revocation must be communicated to be effective. (Stitt v. Huidekopers, 17 Wall. 384; Beach on Contracts, Sec. 37.)

The offerer may withdraw the offer at any time before acceptance, but if he does not do so, how long may the acceptor wait and then accept without the offer lapsing? Will it be a minute, or a week, or longer? This is a question that cannot be answered definitely in any case. The rule is, that the offer continues a reasonable time, and that the determination of a reasonable time depends upon the circumstances of the particular case, and does, in fact, vary from a few minutes in cases to a much longer time. When the facts are shown, what is a reasonable time is a question of law.*

*Loring v. Boston, 7 Metc. 409; Ferrier v. Storer, 63 Ia. 484. The circumstances attending the negotiations, and the character and subject matter of the contract will aid in determining the question of reasonable time. In general, the intention of the parties as to the time the offer is to remain open will govern; if the time is stated there is no trouble, and where no time is stated or agreed on then a reasonable time is in-

Sec. 419. OFFERS ON TIME.—All offers might be considered as on time, as the answer must follow the offer and cannot be exactly simultaneous with it. But by an offer on time is meant one in which the offerer gives the person a definite time within which he may accept. Thus the person making the offer may say, "I will give you this hour, or this day to decide," and thus fixes the time during which the offer is to continue. The offerer may withdraw the offer within the time as there is no consideration for his agreeing to keep the offer open. But in case an option is given to buy or sell within a certain time, and a consideration paid for it, a complete contract has been made which is binding upon both parties.

Sec. 420. GENERAL OF PUBLIC OFFERS.—At its first promulgation an offer need not be made to any specific person. It may be made generally and left open so that any one accepting it is the one contracted with. A common example of such an offer is in the case of a reward, which is offered to all the world, and when its terms are complied with by any one it is binding. But such an offer must be acted on with knowledge of, and with a view to obtaining the

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tended. Convenience, policy and common sense aid in determining what shall be a reasonable time in each particular case. If an offer were made to one who was present and refused to consider it and turned away, the offer would doubtless be construed as terminated at once, but where it is made by mail to one at a distance, it would continue until the party would have a reasonable time to consider and accept, provided it was not recalled in the meantime. See Beach on Contract, Sec. 44.

reward. (Beach on Cont., Sec 41; Burke v. Express Co., 50 Cal. 218; Fitch v. Snedaker, 38 N. Y. 250.) A public offer to do work at fixed terms, is impliedly assented to by one having work done, so a public offer to do advertising at certain rates is accepted by persons having work performed by the person advertising.

A general or public offer is revocable by the offerer at any time before it is accepted or anything done in reliance on it, and if publicly recalled, a person though ignorant of the recall cannot claim reward for the service done. It differs in this respect from a promise made to an individual. (Shuey v. U. S., 92 U. S. 73.)

Sec. 421. OFFERS AT AUCTION, WHEN ACCEPTED?—Bids by persons at an auction are simply offers to buy at that price, and are not binding, and may be withdrawn at any time before acceptance. The acceptance is announced by letting fall the hammer and knocking the article off to the bidder; when this is done the offer is irrevocable.*

*Orders for goods. An order sent by a person to a dealer for goods is an offer to buy, and does not become a contract until it is accepted by the dealer, or some act is done on the faith of it, as the shipment or delivery of the goods. (Dent v. Steamship Co. 49 N. Y. 390; Briggs v. Sizer, 30 N. Y. 652; Crook v. Cowan, 64 N. C. 743.)

What is an offer or proposal? Preliminary negotiations must be distinguished from an offer or proposal. The question is one of intention; did the party mean to make a proposal or was he only settling terms of agreement into which he proposed to enter when all the particulars were adjusted? Until all the terms are settled the proposer may retire from the bargain. So all communications addressed in general language to those interested in a trade or business, as circulars, stating terms upon which goods may be ordered, are mere advertise-

Sec. 422. EFFECT OF FAILURE TO COMMUNICATE ALL THE TERMS OF OFFER.—"If an offer contains on its face the terms of a complete contract, the acceptor will not be bound by any other terms intended to be included in it; unless it appear that he knew of those terms, or had their existence brought to his knowledge and was capable of informing himself of their nature. Cases which illustrate this rule arise when a contract has been made with a railway company for the safe carriage of the plaintiff, or of his luggage; or for the deposit or bailment of baggage in a cloak room; or, as in the last reported case on the subject, where a contract has been made for the deposit of an article and its sale upon commission. In each case the document or ticket delivered to the plaintiff contained terms modifying the liability of the defendant, the offerer, as carrier or bailee; in each case the plaintiff, as acceptor, alleged that the terms were not brought to his notice so as to form part of the offer which he accepted.

"The law applicable to these cases is thus laid down by Mellish, L. J.: 'If the person receiving the ticket did

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ments and not offers. (Beach on Contract, Sec. 36; Hill v. Webb, 43 Minn. 545; Moulton v. Kershaw, 59 Wis. 316; Lincoln v. Erie Preserving Co., 132 Mass. 129.)

Rule as to written draft. If an agreement is concluded and acted upon, it is binding, though it is understood that it is afterwards to be reduced to writing. But if a written draft is viewed as the consummation of the negotiations, and not a mere memorial, there is no contract until it is finally signed. (Beach on Contract, Secs. 2, 3; Steamship Co. v. Swift, 86 Me. 248; Blaney v. Hoke, 14 O. St. 296; Sanders v. Pottlitzer Co., 144 N. Y. 209.)

not see or know that there was any writing on the ticket, he is not bound by the conditions;* if he knew there was writing, and knew or believed that the writing contained conditions, then he is bound by the conditions;** if he knew there was writing on the ticket but did not know or believe that the writing contained conditions, nevertheless he would be bound, if the delivering to him of the ticket in such a manner that he could see there was writing upon it, was, in the opinion of the jury, reasonable notice that the writing contained conditions.' "*** (Anson on Contract, p. 16; Parker v. S. E. Railway Co., 2 C. P. D. 423.)

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* In Henderson v. Stevenson, L. R. 2 H. L. Sc. App. 470, the plaintiff bought a ticket by steamer from Dublin to Whitehaven. On the face of the ticket were these words only, "Dublin to Whitehaven." The back of the ticket contained a statement exempting the company from liability for loss, injury or delay to the holder or his baggage. The vessel being lost by the neglect of the Company's servants, the House of Lords held that the Company were liable for the lost baggage notwithstanding the terms on the back of the ticket, of which the plaintiff knew nothing and consequently could not have assented to.

** Harris v. G. W. Railway Co., 12 B. D. 515. In this case luggage was deposited in the parcel room of the Company, and a ticket given the depositor, bearing on its face the words, "Subject to the conditions on the other side." One of the conditions limited the Company's liability to $25 for each package. The luggage was lost, and a suit brought to recover more than $25; plaintiff admitted a knowledge that the ticket contained conditions, but did not read them. The court held the plaintiff bound by the conditions and limited the recovery to the amount stated.

*** Parker v. S. E. Railway Co., 2 C. P. D. 416. In this case baggage was left in the cloakroom of Company on terms stated on the back of a ticket, on the face of which was printed,

Sec. 423. THE OFFER MUST BE INTENDED AS SUCH.—The intention of the one party to observe the matter in question, expressed to and accepted by the other, for the purpose of creating a right to its observance, constitutes a promise. (Leake on Cont. 13.) But where a person whose horse had been stolen, exclaimed, "I will give $100 to any one who will find out the thief," it was held not to be an offer to pay a reward, but merely an explosion of wrath against the thief. (Higgins v. Lessig, 49 Ill. App. 459.) So where a man with a marriageable daughter said he would give $500 to him who married his daughter with his consent, he was held not to be bound by the offer, the words being considered merely to excite suitors. (Week v. Tibold, Roll. Abr., p. 6.)

And it is held that a proposal must not only be intended to create legal relations, but must also be capable of creating them, that is, must not be so indefinite or illusory as to make it difficult to say what had been promised. (Anson on Contract, p. 19.)

"See back." The plaintiff admitted knowing that there was writing on the ticket, but denied knowing that the writing contained conditions. The decision of the Court of Appeals was, that the plaintiff was bound by the conditions if in the opinion of the jury the ticket amounted to reasonable notice of its existence.

"In all of these cases the question is the same. Have the terms of the offer been fully communicated to the acceptor? And the tendency of judicial decision is towards a general rule, that if a man accepts a document which purports to contain the terms of an offer, he is bound by all the terms, though he may not choose to inform himself of their tenor or even of their existence." (Anson on Contract, p. 18.)

Sec. 424. HOW AN OFFER MAY BE TERMINATED.—We have seen (Section 418) that any offer may be revoked before acceptance, but this rule should except offers under seal. Further we have seen that an offer unaccepted will lapse by the expiration of a reasonable time, and that where the parties have prescribed a definite time the offer terminates by efflux of the specified time without acceptance. (Section 419.)

Again, an offer may be terminated by breach of prescribed conditions as to the mode of acceptance. Thus where the offer was to sell flour the answer to be sent by return of the wagon which brought the offer, an acceptance by letter, though supposed to be speedier was not a proper acceptance. (Eliason v. Henshaw, 4 Wheat., 225.) This failure to accept in the manner prescribed by the offerer may be considered a refusal of the offer as made, and the making of a counter proposition, in which case the offerer may treat the offer as rejected. (Beach on Contract, Sec. 51.) The acceptance must be without condition, and absolute (Egger v. Nesbitt, 122 Mo. 667.) But it is held that if an offer is not revoked, a party may accept it, although he previously asked the proposer to modify the terms. (Stevenson v. McLane, L. R. 5 Q. B. D. 346.)

The death of either party before acceptance terminates the offer. The representatives of the maker of an offer are not bound by an acceptance, nor can they accept it on behalf of his estate. (Anson on Contract, p. 22; Frith v. Lawrence, 1 Paige, 434.) So notice of

the dissolution of a partnership revokes an offer by the firm. (Goodspeed v. Plow Co., 45 Mich. 322.)

Sec. 425. AGREEMENTS MADE BY POST CONSIDERED.—An offer communicated by letter is construed a continuing offer during every instant of time until it has reached the person addressed and a reasonable time has been given in which to accept or reject.* It may be withdrawn by the sender at any time before the letter of acceptance is mailed, but the notice of withdrawal must reach or be communicated to the person to whom the offer has been made before it is effective.** The acceptance of an offer by post is

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* Adams v. Lindsell, 1 B. & Ald. 681. In this case there was an offer to sell wool to plaintiff made by letter dated Sept. 2d, 1817. The letter was misdirected and did not reach plaintiff until Sept. 5th, it was then accepted and letter posted; the defendant had in the meantime sold the wool elsewhere. The plaintiff sued for the non-delivery of the wool, and the defendant claimed that the contract was not complete until the letter of acceptance reached him. But the court held "that if that were so no contract could ever be completed by the post. For if the defendants were not bound by their offer, when accepted by the plaintiffs, till answer was received, then the plaintiffs ought not to be bound till after they had received the notification that the defendants had received their answer and assented to it. And so it might go on ad infinitum." The case intimates that the postoffice is made the agent for the party making the offer, both to deliver the offer and receive the acceptance. (Beach on Contract, Sec. 37.)

** *** Byrne v. Van Tienhoven, 5 C. P. D. 349. In this case the offer was sent by post from Cardiff on October 1st to the plaintiff at New York; the offer requested a reply by cable. On the 11th of October the plaintiff received the letter and at once accepted by cable. On the 8th of October a letter had been posted withdrawing the offer. The court

complete when the letter of acceptance is duly posted, properly addressed and prepaid. The assent of the parties to the terms is then complete, and the agreement is binding on both, and this is so although a letter withdrawing the offer has been written and posted previously, but not yet received by the offeree.*** The acceptance makes the contract when posted, and it does not matter if the letter of acceptance fails to reach the offerer.****

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passed upon the two questions: "1. Whether a withdrawal of an offer has any effect until it is communicated to the party to whom the letter is sent. 2. Whether posting a letter of withdrawal is a communication to the person to whom the letter is sent." And held "that both legal principle and practical convenience require that a person who has accepted an offer not known to him to have been revoked shall be in a position safely to act upon the footing that the offer and the acceptance constitute a contract binding upon both parties." To the same effect, see Tayloe v. Merchant Fire Ins. Co., 9 How. 290; Hamilton v. Lycoming Ins. Co., 5 Pa. St. 342; Lungstrauss v. German Ins. Co., 48 Mo. 201. The rule just stated is well settled in this country where the letter of acceptance is mailed, or placed in the hands of an agent of the proposer, but if the acceptance be sent by an agent of the acceptor, then the rule is that it must be received by the proposer. (Minnesota Oil Co. v. Collier Lead Co., 4 Dill. 431; Washburn v. Fletcher, 42 Wis. 152.)

.Where an offer is made and a stated time given in which the offer may be accepted, such an offer without consideration may be retracted at any time, and it seems that in such a case no formal notice is necessary to constitute a withdrawal of the offer. It is held sufficient if the person making the offer does some act inconsistent with keeping the offer open, as, selling the property or thing to some other person, and that the person to whom the offer was made has knowledge of such act. (Pomeroy on Cont. Sec. 61; Dickinson v. Dodds, 2 Ch. D. 453.) And see Cooke v. Oxley, 3 Term, 653.

**** Household Ins. Co. v. Grant, 4 Ex. D. 221 This case

Sec. 426. SAME SUBJECT—SPECIAL HOLDINGS.—In Massachusetts the law is that an acceptance by post only takes effect when it reaches the proposer. (McCulloch v. Ins. Co., 1 Pick. 278.)

Where the sender in mailing an acceptance has, under the postal regulations, a "locus poenitentiae" or opportunity to withdraw the letter before it leave the town, the postoffice is probably his agent until the letter has left the town. But if there can be no reclamation of the letter it is the property of the addressee as soon as posted. (Beach on Contract, Sec. 60; Ex-Parte Cote, L. R. 9 Ch. App. 27.)

The authority to accept by post arises from the intention of the parties, which may be express, or gathered from the fact that in the ordinary conduct of affairs it must have been intended that the post was to be the means of communication. Where it is the custom and general usage to deal by post, the authority will be presumed. (Beach on Contract, Sec. 61.)

It is well settled, both in the United States and England, that the rules applicable to communications by post, govern communications by telegraph. ("Contracts by Telegraph," 14 Am. L. Reg. 401; Trevor v. Ward, 36 N. Y. 307; Egger v. Nesbitt, 122 Mo. 667.)

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holds that the agreement is complete from the moment the letter is put in the mail, and that the subsequent fate of the letter can not affect it. Thesiger, L. J., stating the law to be, "that the acceptor, in posting the letter, has put it out of his control and done an extraneous act which clenches the matter and shows beyond all doubt that each side is bound. How then can a casualty in the post, whether resulting in delay, which in commercial transactions is often as bad as no delivery, or in non-delivery, unbind the parties or unmake the contract?"

The place of the contract, when material, is determined by the place of acceptance. So where an offer was made in Boston and accepted by telegram from Providence, R. I., the contract was held to have been made in Rhode Island, though it was to be performed in Massachusetts. (Perry v. Mt. Hope Iron Co., 15 R. I. 380.)*

Sec. 427. REALITY OF CONSENT.—Consent being an act of mind, it follows that there must be mental capacity in the contracting parties, and we shall see that insane persons, idiots, etc., cannot assent to or make an offer which will bind them. Further, the consent of the contracting parties must be real and genuine, and if given under such circumstances as negative a genuine expression of intention there is no valid agreement. The cases or causes of unreality of consent are usually classified as arising from, Mistake, Misrepresentation, Fraud, Duress, and Undue Influence, each of which we shall notice briefly.

Sec. 428. SAME SUBJECT—MISTAKE.—Where the parties have not meant the same thing; or one or both may, though meaning the same thing, have formed untrue conclusions as to the subject matter of the agreement, it is a mistake. (Anson on Contract, p. 121.)

Mistake of intention, which is here being considered,

*"The place of contract is material as prima facie denoting the law by which it is to be construed and regulated, and the law by which the capacity of the parties to the contract, as dependent upon infancy, lunacy, marriage, is determined." (Leake on Contract, 49.)

is to be distinguished from mistake of expression, which the courts allow parties to explain or correct. It is also to be distinguished from failure of consideration, where the question is not whether the party contracted at all, but whether the terms of the contract have been fulfilled. If a party fails to put in the agreement all the terms of the contract consented to and thereby bind the other party to fulfillment, this is not mistake. It is to be observed that the cases in which mistake invalidates contracts are exceptions to the general rule stated in a previous section (Ante, Sec. 415) that the parties are bound by their assent, expressed in plain terms, and uninfluenced by fraud or duress.

Anson, in his work on contracts mentions several instances of mistake as follows:

(a) Mistake as to the Nature of the Transaction. This, he says, is of rare occurrence, because men usually know what they are contracting about. The mistake arises from some misrepresentation or deceit on the part of a third party, and thus distinguishes the case from that of fraud. Where a deed was executed by an illiterate person who was told that it was a release of arrears of rent, it was held void for mistake. (Thoroughgood's Case, 2 Co. Rep. 9.) So in Foster v. McKinnon, L. R. 4 C. P. 704, an indorsement of a bill of exchange was secured by the representation by the acceptor that it was a guarantee, and it was held not to be a binding endorsement, though in the hands of a subsequent bona fide endorsee for value. This rule is followed in the American cases, the reason for

the rule being that it is invalid not merely for fraud, if fraud is present, but because the mind of the signer did not accompany the signature; that is, he never intended to sign such a contract as he did sign. But the rule is qualified to this extent, that as a defense against a bona fide holder of negotiable paper, the defendant must show that he was not guilty of negligence in signing the paper. (Piffer v. Smith, 57 Ill. 527; Soper v. Peck, 51 Mich. 563; Ross v. Doland, 29 Ohio St. 473.)*

(b) Mistake as to the Person with Whom the Contract is Made. A party contracting with another has regard to his credit and character, and is not bound if by mistake, or without his consent, another is substituted for the one intended to be contracted with. Thus, in a case where ice was being supplied to a customer by a dealer, and another bought the dealer's business and kept on supplying the consumer without notifying him of the change, it was held that there was no privity of contract between the new dealer and consumer, which, with the possession and use of the property, would support an implied promise to pay for the ice. (Boston Ice Co. v. Potter, 123 Mass. 28; Boulton v. Jones, 2 H. & N. 564.)

*In nearly all of the United States it has been held, that a person in full possession of his faculties, and not illiterate to the extent of inability to read, who signs a paper or note under the belief that it is a contract of a different character, though he has not read it, and has relied on the reading and representations of another, is still bound, as his execution of the paper under such circumstances is prima facie negligence as will render him liable to a bona fide holder. (Baldwin v. Barrows, 86 Ind. 351; Chapman v. Rose, 56 N. Y. 137; Mackey v. Peterson, 29 Minn. 299.)

(c) Mistake as to the Subject Matter of the Contract. In order to constitute such a mistake as to the subject matter of the contract as to avoid it, it must clearly appear that the party, without any fault of his own, made a prima facie agreement contrary to his real intention. A mere mistake as to his powers, judgment, rights, etc., will not entitle a party to avoid a contract which he has knowingly, but indiscreetly, entered into.*

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*"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms." (Blackburn, J., in Smith v. Hughes, 6 Q. B. p. 607.)

"The question is not what the parties thought, but what they said and did. A sells to X, and X believes that he is buying 'this bar of gold,' 'this barrel of oysters,' 'this case of champagne.' The bar turns out to be brass, the barrel to contain oatmeal, the case to contain sherry. The parties are honestly mistaken as to the subject-matter of the contract, but their mistake has nothing to do with their respective rights. These depend on the answer to the question: Did A sell to X a bar of metal or a bar of gold? a case of wine or a case of champagne? a barrel of provisions or a barrel of oysters? A contract for a bar of gold is not performed by the delivery of a bar of brass. A contract for a bar of metal leaves each party to take his chance as to the quality of the thing contracted to be sold, but this again would not be performed by the delivery of a bar of wood painted to look like metal." (Anson on Contract, pp. 127-8.) Such a failure to deliver the article sold, or the delivering of one of a different character, is not mistake of intention, but merely failure of consideration—failure to perform the terms of the contract. The contract exists, but is broken; but where there is mistake of intention, there is no contract created.

Mistake as to the subject-matter of a contract, says Anson, will only avoid it in three cases: (i) Where the parties have agreed upon the subject-matter, but unknown to them it has ceased to exist, the contract is void.* (ii) Where there are two things of the same name or description, and the parties fail to agree in intention to the identity of the subject-matter, the contract fails.** (iii) Where there is a mistake in intention as to the nature of the thing promised, and such mistake is known to the party to whom the promise is made, and he does not inform the promisee, the contract is not binding.***

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* Couturier v. Hastie, 5 H. L. C. 673. In this case there was a sale of a cargo of corn which was supposed by the parties at the date of sale to be in voyage from Salonica to England. The corn had been as a matter of fact unloaded and sold prior to the date of the agreement because it had heated and was about to spoil. The contract of sale was held void, as the intention was that there was something to be sold, and something to be purchased at the time, when in fact the object contemplated had ceased to exist. (Gibson v. Pelkie, 37 Mich. 380; Brick Co. v. Pond, 38 Ohio St. 65.)

** Raffles v. Wichelhaus, 2 H. & C. 906. Where the agreement was for the sale of a cargo of cotton "to arrive ex Peerless from Bombay," there being two ships of that name, the buyer meaning one and the seller the other, it was held that there was no contract. The buyer was not bound to accept cotton though it arrived as stated, because it was not the vessel he had intended when he made the contract.

*** Smith v. Hughes, L. R. 6 Q. B. 597. In this case the defendant was sued for refusing to accept oats which he had bought of the plaintiff; his defense was that he intended and had agreed to buy old oats, and the oats delivered were new. The court held that it was not enough to excuse the defendant that the plaintiff knew that the defendant intended and thought he was buying old oats, but to avoid the sale, the plaintiff

Effects of Mistake. As has been seen in the previous sections, the effect of mistake is to avoid the contract. The common law remedies being the right to repudiate the agreement, and set up the mistake as a defense to any action brought to enforce it; and in case money has been paid under the contract it may be recovered because of the failure of the contract by mistake. In equity the mistake will be a good defense to a suit for specific performance, and the court will declare the contract void.

Sec. 429. SAME SUBJECT—MISREPRESENTATION.—"One of the parties may have been led to form untrue conclusions respecting the subject matter of the contract by statements innocently made, or facts innocently withheld by the other. This is Misrepresentation." (Anson on Cont. p. 121.)

Misrepresentation is to be distinguished from fraud; and from such a representation of facts as amounts to a promise, which, if proven untrue, allows the contract to be formed, but gives a right of action for the breach of the promise. We are now treating of the misrepresentations which affect the validity of the contract and not of those which affect the performance of a con-

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must have known that the defendant thought he was being promised old oats. It was said that if the plaintiff knew that the defendant was contracting on the assumption of getting old oats, "he is deprived of the right to insist that the defendant shall be bound by that which was the apparent, and not the real bargain." But it was stated by the court that the sale of a specific article, without warranty of a specific quality, is not to be avoided, though the one party supposed it to be of that quality. See Anson on Contract, 132-4.

tract. Fraud voids the contract and also gives an action for the wrong or deceit; misrepresentation merely invalidates the contract. It is fraud, and involves the action of deceit, if there is knowledge of the false statement, though no dishonest motive is present. (Polhill v. Walter, 3 B. & Ad. 114; Bartlett v. Tucker, 104 Mass. 636; McCurdy v. Rogers, 21 Wis. 197.) So statements, if intended to be acted upon, which are made recklessly and without reasonable grounds of belief, constitute fraud. (Walsh v. Morse, 80 Mo. 568.)

Misrepresentations made by one party to another, or innocent non-disclosure of facts, only affects the validity of certain contracts in which the greatest of good faith between the contracting parties is required. Anson mentions contracts of marine or fire insurance, contracts for the sale of land, and for the purchase of shares in companies as contracts in which such misrepresentation is fatal to the formation of the contract. (Anson on Cont. p. 137).*

The contracts which are affected in their formation by misrepresentation or non-disclosure, are of a nature that one of the parties must rely upon information

*"In dealing with innocent misrepresentation and non-disclosure of fact, we may say generally that, unless they occur in the particular kinds of contract already mentioned, they do not affect the validity of consent. The strong tendency of the courts has been to bring, if possible, every statement which, from its importance, could affect consent, into the terms of the contract. If a representation can not be shown to have had so material a part in determining consent as to have formed, if not the basis of the contract, at any rate an integral part of its terms, such a representation is set aside altogether." (Anson on Contract, p. 139.)

furnished by the other, and more confidence must of necessity be placed in the party making the disclosures; hence the contracts are said to be "uberrimae fidei," that is, of the most abundant good faith.

Marine Insurance. In McLanahan v. Universal Ins. Co. 1 Pet. 170, the court, speaking of marine insurance, said: "The contract of insurance is one of mutual good faith; and the principles which govern it are those of enlightened moral policy. The underwriter must be presumed to act upon the belief that the party procuring insurance is not, at the time, in possession of any fact material to the risk, which he does not disclose." Every fact which would influence the accepting or rejection of the risk by the underwriter, is material, and must be communicated; any concealment, though resulting from accident, or mistake, will, when material, avoid the policy. (Lexington Ins. Co. v. Paver, 16 Ohio, 334; Knowlton's Ed. of Anson on Contract, p. 190n.)

Fire Insurance. "In the contract of fire insurance the description of the premises appears to form a representation on the truth of which the validity of the contract depends." (Anson, Cont. p. 148.) But it is said that not so high a degree of good faith and diligence is required in fire insurance as in marine insurance, and the rule of marine insurance that the insured is bound, without inquiry, to disclose every fact within his knowledge material to the risk, does not apply in its full extent. (Wood on Fire Ins. Sec. 196n; Burritt v. Saratoga Fire Ins. Co. 5 Hill, 192.) And now where applicants for insurance fill out the inquiries submitted,

in writing, an innocent failure to communicate facts about which the insured was not asked, will not avoid the policy of insurance. (Washington Mills Co. v. Weymouth Ins. Co. 135 Mass. 505; Browning v. Home Ins. Co. 71 N. Y. 548.)

Life Insurance. "The contract of life insurance differs from those of marine and fire insurance in this respect. Untruth in the representations made to the insurer as to the life insured will not affect the validity of the contract unless they be made fraudulently, or unless their truth be made an express condition of the contract." (Anson on Cont. p. 149; Wheelton v. Hardisty, 8 E. & B. 232; Schwarsbach v. Pro. Union, 25 W. Va. 655.) But in Vose v. Eagle Life & Health Ins. Co. 6 Cush. 42, it is said: "An untrue allegation of a material fact will avoid the policy, though such allegation or concealment be the result of accident or negligence or design." The rule seems to be that if the representations were material to the risk and falsely made, they avoid the policy. (Campbell v. New Eng. Ins. Co. 98 Mass. 396.)

Sale of Land. "In agreements of this nature a misdescription of the premises sold or the terms to which they are subject, though made without any fraudulent intention, will vitiate the contract." (Anson on Cont. p. 150.) In this case the contract is not strictly "uberrimae fidei," and though latent defects in the title should be disclosed by the vendor, yet "if the vendor has said or done nothing to throw the purchaser off his guard or to conceal a patent defect, there is no fraudulent concealment on the part of the vendor; the pur-

chaser has an opportunity of inspecting and judging for himself; and the principle of caveat emptor applies." (2 Add. on Cont. 914.)

Purchase of Shares in Companies. "Those who issue a prospectus holding out to the public the great advantages which will accrue to persons who will take shares in a proposed undertaking, and inviting them to take shares on the faith of the representations therein contained, are bound to state everything with strict and scrupulous accuracy, and not only to abstain from stating as fact that which is not so, but to omit no one fact within their knowledge the existence of which might in any degree affect the nature, extent or quality of the privileges and advantages which the prospectus holds out as inducements to take shares." (Per Kindersley, V. C. in Brunswick & Canada Ry. Co. v. Muggeridge, 1 Dr. & Sm. p. 381.)

It is to be observed that expressions of opinion, and such commendatory expressions as are ordinarily used to induce purchasers to buy are not treated as fatal representations, though occurring in the special contracts just mentioned, and more extravagant than correct. (Anson, Cont. pp. 152-3.)

Sec. 430. SAME SUBJECT—FRAUD.—Where untrue conclusions have been induced by representations of one party, made with a knowledge of their untruth, and with the intention of deceiving, it is fraud. (Anson, Cont. p. 121.)

The essential features which constitute Fraud are: (a) A false representation of fact, (b) made with a knowledge of its falsehood, or in reckless disregard

whether it be true or false, (c) with the intention that it should be acted upon by the complaining party, (d) and actually inducing him to act upon it. (Anson, p. 154-5.) We shall consider each of these elements briefly.

(a) False Representation of Fact. Mere innocent non-disclosure does not constitute fraud; there must be a false statement, or one true in part, but which, because of the parts concealed, makes it convey a false impression.*

So it is held that where the defendant rented a house which he knew was desired for immediate occupation, and knew that it was in an unfit and dangerous state, but did not disclose this fact to the plaintiff, the action for fraud would not lie. This was so because there was no representation, or warranty, expressed or implied that the house was fit for occupation. (Keates v. Lord Cadogan, 10 C. B. 591.) But it is the duty of the

*Ward v. Hobbs, 3 Q. B. D. 150; 4 App. Cas. 14, was a case where the defendant sent pigs to a public market knowing that they were suffering from a contagious disease. They were sold "with all faults" to the plaintiff. A large number of them died from the disease, and other pigs of the plaintiff were infected with the disease. It was claimed for the plaintiff that the placing of the pigs in the market for sale amounted to a representation that they were free of disease of a contagious nature. In the Court of Appeals it was held that the facts did not authorize the jury to find that the defendant represented the pigs as free from infectious disease. In this case the sale was "with all faults," and without warranty. And it is said that the sale of an animal, known to have a contagious disease, without communication of the fact to the buyer, is a fraud for which an action on the case will lie. (Jeffrey v. Bigelow, 13 Wend. 518; Minor v. Sharon, 112 Mass. 477.)

landlord to inform the tenant of the existence of any nuisance on a premise which may be prejudicial to life or health, and if this information is not given an action for fraud or deceit will lie. (Caesar v. Karutz, 60 N. Y. 229; Lucas v. Caulter, 104 Ind. 81.)

It must be a representation of fact, and not a mere expression of opinion or intention, if it is to constitute fraud. A representation by the seller that the article is worth a given sum, is a mere expression of opinion and not a representation of fact. (Noetting v. Wright, 72 Ill. 390; Cagney v. Cuson, 77 Ind. 494.) So statements as to the cost of an article are treated as mere opinions unless made under such circumstances as justify the buyer in relying on them as statements of fact. (Cooper v. Lovering, 106 Mass. 79; Markel v. Mondy, 11 Neb. 213.) As regards intention, it is to be observed that while a statement of future intention is not a statement of fact, a false expression of present intention is such a fraud as invalidates the contract. For example, the purchase of goods with the intention not to pay for them is held to be a fraudulent misrepresentation. (Anson on Cont. p. 156; Donaldson v. Farwell, 93 U. S. 631; Talcott v. Henderson, 31 O. St. 162.)*

* Misrepresentation of law or of the legal effect of a contract is not fraud for which the contract may be rescinded, or the action of deceit brought, unless the misrepresentation has been made by a party holding a relation of confidence or trust with the other party, or the party to whom they are made is ignorant and unable to judge of the legal operation and effect of the instrument or contract. (Berry v. Whitney, 40 Mich. 71; Townsend v. Coles, 31 Ala. 428; Upton v. Tribilcock, 91 U. S. 45.)

(b) Made with Knowledge of Its Falsehood or in Reckless Disregard of Its Truth or Falsity. If a representation is made without knowledge of its being false, and without such recklessness of statement as constitutes bad faith, the party injured has no right of action. (Cole v. Cassidy, 138 Mass. 437; Terrell v. Bennett, 18 Ga. 404; Cox v. Higby, 100 Pa. St. 249.)**

It is not necessary that a dishonest motive be present to constitute fraud. Misrepresentations in fact false, though believed or hoped to be true, if not justified by the knowledge of the party making them, will constitute fraud. (Polhill v. Walter, 3 B. & Ad. 114.)

(c) Made with Intention to Be Acted Upon by the Complaining Party. This does not require the statements to be made to the injured party, and if damage results from the false statement as a direct consequence,

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** "The general rule of law is clear that no action is maintainable for a mere statement, although untrue, and although acted upon to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it." (Per Bramwell, L. J., in Dickson, v., Reuter's Tel Co. 3 C. P. D. 1.)

"It is now settled that a statement made with a bona fide belief in its truth can not be treated as fraudulent; but reckless assertions are on the border line, which it is hard to draw accurately between truth and falsehood. There may well be occasions in the course of business when a man is tempted to assert for his own ends that which he wishes to be true, which he does not know to be false, but which he strongly suspects to have no foundation in fact. Such statements can not be regarded as bona fide, and the maker of them must be held responsible if they turn out to be false." (Anson on Cont. p. 159.)

the party guilty of the fraud is responsible to the party injured.*

Where a druggist negligently labels poison so that it appears as a harmless medicine and sells it to dealers in such articles, he is liable to any one who buys it and is injured by its use, providing there is no negligence on the part of the retailers. (Davidson v. Nichols, 11 Allen 519.)

So it is held that representations made to commercial agencies by business firms as to their financial standing and responsibility for the purpose of securing credit and a rating, if untrue, will form the basis of an action for deceit by a person dealing with the firms on the strength of the representations. (Eaton v. Avery, 83 N. Y. 31; Genesee Co. Savs. Bk. v. Mich. Barge Co., 52 Mich. 164.)

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* Langridge v. Levy, 2 M. & W. 519. A gun was sold to the father of the plaintiff upon the representation that the gun had been made by "Nock" and was "a good, safe and secure gun." The plaintiff used the gun, it exploded and injured to such an extent that his hand had to be amputated. The representations made by the seller of the gun were proven to be untrue, and the court held that he was liable upon them though made to the father and not to the plaintiff.

In Barry v. Croskey, 2 J. & H. I,. Wood, V. C., says: "Every man must be held liable for the consequences of a false representation made by him to another upon which a third person acts, and so acting is injured or damnified, provided it appear that such false representation was made with the intent that it should be acted upon by such third person in the manner that occasions the injury or loss. But to bring it within the principle, the injury, I apprehend, must be the immediate and not the remote consequences of the representation thus made."

(d) The Representation Must Induce the Party to Act. "In an action of deceit the plaintiff cannot establish a title to relief simply by showing that the defendants have made a fraudulent statement; he must also show that he was deceived by the statement and acted upon it to his prejudice."—Per Cotton L. J., in Arkwright v. Newbold, 17 Ch. D. 324. (Marshall v. Hubbard, 117 U. S. 415; Branham v. Record, 42 Ind. 181; Bartlett v. Blaine, 93 Ill. 25.)

The Effect of Fraud. The effect of fraud upon the contract is to be distinguished from the right given the injured party, both at common law and in equity, to recover from the injuring party the loss occasioned by the fraud. The perpetration of a fraud gives the injured party a right to recover independent of contract, and also affects the rights of the parties under the contract. It is the effect which fraud has on the contract that we wish to consider.

The party to the contract who has been injured by the fraud of the other party, has a two-fold right; he may, on discovery of the fraud, affirm the contract, retain the article or goods sold, and sue for the damage sustained because of the fraud. Or, he may elect to rescind the contract, and may then resist an action brought upon it at common law, or for specific performance in equity; or obtain a judicial avoidance of it in equity. (Anson on Cont. p. 163.)

The contract, until the injured party has elected his remedy, is voidable, and not void. The right is limited in this, that it must be exercised before accepting a benefit with knowledge of the fraud, and before deal-

ing with the subject-matter of the contract so that the position of the parties cannot be restored, and also before innocent third parties have acquired an interest for value under the contract. See Dean v. Yates, 220 St. 388; Cochran v. Stewart, 31 Minn. 435.

Sec. 431. SAME SUBJECT—DURESS.—Where the contract is assented to by one of the parties by reason of his being coerced by actual or threatened violence, it is duress, and the party coerced may avoid it. What constitutes duress has been explained in a previous volume of this series, and need not be repeated here. (Vol. 3, Sec. 254, Home Law School Series.)

The duress to be ground of avoidance of the contract must affect the promisor and not some third person, and it must be a personal injury which is impending and an injury to property. (Anson on Cont. p. 164.) See Hackly v. Headly, 45 Mich. 570.

Sec. 432. SAME SUBJECT—UNDUE INFLUENCE.—"Circumstances may render one of the parties morally incapable of resisting the will of the other, so that his consent is no real expression of intention. This is Undue Influence." Anson on Contract, p. 122.

Undue Influence is a sort of fraud which does not include deceit or circumvention; it means an unconscientious use of the power arising out of the circumstances and conditions of the parties. And it is said that, when from the relative positions of the parties the presumption of undue influence arises, the contract cannot stand unless the party claiming the benefit of it can show that it is fair, just, and reasonable. (Earl of Aylesford v. Morris, 8 Ch. 490.)

The presumption of the presence of undue influence n contract may arise from circumstances as well as rom the relations of the parties. Anson mentions the ollowing as arising from the circumstances, "that equity will not enforce a gratuitous promise even hough it be under seal; that the acceptance of a voluntary donation throws upon the person who accepts it he necessity of proving 'that the transaction is righteous;' that inadequacy of consideration is regarded as an element in raising the presumption of undue influence or fraud, but does not amount to proof of either."

Of the relations between the parties which will raise the presumption of undue influence, the following are examples: The parental relation, as between father and son, or quasi-parental as between uncle and niece; the confidential relations, as attorney and client, doctor and patient, etc.; and the relation between a person and his spiritual adviser. But beyond these special relations of confidence or trust existing between parties, the courts are inclined to hold that any influence, however gained, may raise the presumption of unfair dealing.*

So the courts have guarded persons against those

*Smith v. Kay, 7 H. L. C. 750. In this case the influence exerted by a man advanced in years over a young person who had just obtained his majority, though neither spiritual, parental or fiduciary, entitled the young man to relief from the court. It was said that while in the special relations the influence was presumed in the outside cases it had to be proved extrinsically, but when proved the remedy was granted just as freely in the one case as the other.

who would take advantage of their improvidence, moral weakness, or of their ignorance and unprotected situation. Thus, expectant heirs at the common law are protected from extortionate rates of interest, and those dealing with uneducated persons or those under pressure will be required by the equity courts to show fairness and honesty on their part. (1 Story's Eq. 336; Jenkins v. Pye, 12 Pet. 241.)

In the case of the sale of the equity of redemption by a mortgagor to the mortgagee, the courts will scrutinize the transaction and refuse to carry out the express agreements of the parties when it would be a gross injustice to the one to do so. (Dorrill v. Eaton, 35 Mich. 302; Butler v. Duncan, 47 Mich. 94.)

Right to Rescind for Undue Influence. In general, the right to avoid a contract for undue influence is the same as in the case of fraud, with this exception, that while an affirmation of the contract after knowledge of fraud binds the party in the case of undue influence he will not be bound by such affirmation unless it is clear that the influence or difficulty under which he labored is entirely removed. (Anson on Contract, p. 170.)

II.—CONSIDERATION.

Sec. 433. NECESSITY OF CONSIDERATION TO A VALID CONTRACT.—As a general rule of law every valid contract must be founded upon a legal consideration moving from the promisee to the promisor, and mere gratuitous promises will not be enforced. (Bank v. Rice, 107 Mass. 37.) The consideration may consist of a benefit to the maker of a promise, or some loss, trouble or inconvenience, or a charge or

obligation resting upon the party to whom the promise is made. (Beach on Cont. Sec. 5.)

The only exception to this general rule requiring a consideration, is in the case of specialties, or contracts under seal, where it is said that the seal or the form of the contract imports a consideration. (Northern Assurance Co. v. Hotchkiss, 90 Wis. 415.)

A contract or agreement, other than specialties, in which no consideration has passed, is termed a "nudum pactum," or naked agreement, and is without binding force. The term is derived from the civil law, where it designated such stipulations as were not clothed with the prescribed formalities or "vestitum," and was called "nudum," or naked, because of the absence of these formalities.

Sec. 434. CONTRACTS UNDER SEAL, OR SPECIALTIES.—The rule of the Common law is that a contract executed with a seal, called a specialty, does not require a consideration. The origin of this rule is traced to the fact that in the early history of the law, form was of more importance than consideration. So that the seal or the solemn form of entering into the contract entitled it to be enforced in law. In the Civil law, formality was also important in the formation of contract. With the development of contract it became necessary to have a universal test to determine what contracts should be actionable, and this test was supplied by the doctrine of consideration. Informal promises were held to be enforceable if there was a consideration, or "quid pro quo" for the promise. And this test first applied in the chancery courts and adopted

into the common law courts, has come to be so universal as to overshadow the formal contract, which is said to be valid because the seal imports a consideration. (Anson on Cont. p. 49)*

*Formal Contracts, and Seals. "There is another division of contracts into specialties and parol or simple contracts. Specialties include contracts under seal and obligations of record. Simple contracts, otherwise denominated parol contracts, include all other contracts, whether written or oral. It is then the seal or the record which constitutes the specialty. Seals are of two kinds, public and private. Public or official seals are those used by public officers, for the authentication of public documents. With these we have at present no concern. Private seals are those used by private individuals, in the execution of private contracts. A sealed contract is technically called a specialty, deed, bond, covenant, or writing obligatory. Every contract may be under seal, if the parties so elect; and there are some contracts which are invalid without a seal; as deeds for the conveyance of real estate, and various kinds of bonds prescribed by statute. The law relating to these contracts abounds with technical and arbitrary distinctions, which serve no other purpose than to confuse the mind. There is perhaps no branch of the law in which reform would be more salutary. It may be safely asserted that the total abolition of private seals would be an immense improvement, without any admixture of evil; for they are not only of no conceivable use, but positively injurious, from the complexity which they occasion. This will be evident from a brief examination. According to Blackstone, seals were first introduced because men could not write. (2 Bl. Com. 295.) Not being able to ratify contracts by signature, each person had his own particular seal, with some distinctive device, which he used in the place of a signature. The moment, therefore, that writing became general, the reason of using seals ceased; but the custom nevertheless continued. From the origin of seals, then, we gather this: that instead of being a 'relic of ancient wisdom,' as the books declare, they are in reality a monument of ancient ignorance. We further learn that the original purpose of a seal has been entirely lost sight of in modern times; for we not only never affix a seal without

Sec. 435. SAME SUBJECT—DISTINCTIONS.

At Common law, the presence of a seal is said to im-

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a signature, but where a person can not write his own name, we write it for him, and he ratifies it. * * * For what purpose then are seals continued in use? The pretext is that they add solemnity to the instrument to which they are affixed. To judge from the language of the books, one might suppose that a seal was some mystic symbol or amulet; and that the ceremony of affixing it was attended with something like religious pomp. But according to Lord Coke (Inst. 169), 'a seal is wax impressed, because wax without an impression is not a seal.' The solemnity, then, which is attached to a seal, must consist in melting the wax, and making the impression; a rite which can not be very august or awful. But how is even this solemnity diminished, when we come to a definition of a seal in our statutes; which may be 'either of wax, of wafer, or of ink, commonly called a scrawl seal.' * * * The 'scrawl' seal which we have substituted, possesses the same mysterious virtue as the wax described by Coke!" (Walker, Am. Law, pp. 463-4.)

This language of Professor Walker, used in 1844. indicates the effort which is required to bring about a reform, or the dropping of a useless technicality in legal science. In a number of States such assaults have borne good fruits. Thus, in Ohio, private seals are abolished, and the affixing of such a seal to any instrument whatever shall not give such instrument any additional force or effect, or in any way change the construction thereof. (Rev. Stat. Ohio, Sec. 4.) In the States generally, while a seal imports consideration, yet want of consideration may be shown in defense to an action on a sealed instrument. And in a number of States all distinctions between sealed and unsealed instruments are abolished. See Codes of Iowa, California, Kentucky, Kansas and Indiana.

The legislation regarding seals has taken three forms: (1) The abolishing of all private seals (Ohio, Ind., Kan., Neb., Tex., N. Dak., S. Dak.). (2) Abolishing all distinctions between sealed and unsealed instruments (Ky., Tenn., Tex., Cal., Ore.). (3) Making seal, when used, only presumptive evidence of consideration which may be rebutted as if unsealed. (Beach on Cont. Sec. 150; Stimson Am. Stat. Law, 455; Allen v. Allen, 40 N. J. L. 446.)

port a consideration, without its being expressly stated, and to preclude the denial of that fact, while the same words without a seal would have no such effect. (2 Kent Com. 464.) So statements made in a deed or under seal are said to be absolutely conclusive against the parties, and to estop the party from proving anything to the contrary. (Sage v. Jones, 47 Ind. 122.)* So a contract under seal, being of a higher nature, supersedes a simple contract upon the same subject-matter; this is the doctrine of merger. (Banorgee v. Hovey, 5 Mass. 11.) At Common law, a debt due under a sealed contract was entitled to a priority out of the assets of the deceased, before debts due upon contracts not under seal. But this doctrine is eliminated by our statutes of distribution. (Walker, Am. Law, p. 465.) Quite generally a right of action arising upon a simple contract is barred in less time than an action arising from a contract under seal. So at Common law a gratuitous promise under seal is binding, when the same promise without the seal would be absolutely void. (Anson on Cont. p. 49.) It is to be observed that this rule is quite generally abrogated in the American States. See note to previous section.

Sec. 436. SAME SUBJECT—DEEDS, BONDS, RECORDS.—1. Deeds. The term "deed" is applicable to all contracts under seal, but it is now most frequently used in a limited sense to denote an instrument for the conveyance or incumbrance of real estate. Its execu-

*Recitals in a deed do not estop a stranger from showing the real facts as against a party to the deed. (Thomaston v. Dayton, 40 Ohio St. 63; Allen v. Allen, 45 Pa. St. 473.)

tion consists in its being "signed, sealed and delivered," and is then conclusive between the parties. Its form and requisites will be fully discussed under the subject "Real Property" in a subseqeunt number of the Home Law School Series.

2. Bonds. A bond is an instrument under seal acknowledging the existence of a debt. It differs from a "covenant" in that the latter is always an executory contract for something future, though each is called a "writing obligatory."*

3. Records. Specialties of record are obligations of indebtedness evidenced by judicial records. The records form the highest evidence, and the only question that can be controverted is, whether the record exists. So specialties of record are the highest kind of specialties. They are of two kinds: Recognizances, and judg-

*"Bonds are of two kinds, single bonds and penal bonds. A single bond, more frequently called a single bill, is a simple acknowledgement of indebtedness without any condition of qualification; as if I, under hand and seal, acknowledge myself indebted to you in a given sum. A penal bond is an acknowledgement of indebtedness, accompanied by a condition, upon compliance with which such acknowledgement is void. The sum here made as a debt is called a penalty, because it is inserted merely to secure the performance of the condition, which is the principal thing. It is held that an action will not lie to recover a penalty, unless it be under a seal. * * * The very idea of a penalty supposes that the amount is greater than the value of the condition, the performance of which it is designed to secure; yet, as the law formerly stood if the condition was not strictly performed, the entire penalty could be recovered. The hardship thus occasioned induced chancery to interfere and prohibit the recovery of anything more than reasonable damages, and statutes permit the courts of law to do the same thing." (Walker, Am. Law, pp. 466-7.)

ments or decrees. A recognizance is an acknowledgment of indebtedness made before a court or authorized officer, with a condition making it void on the happening of certain things mentioned in it, and the whole forming part of the record of the case. A judgment or decree is the final decision of a court upon a matter submitted to it, and being entered of record forms the highest kind of a specialty, as its terms admit of no dispute, but are proved by the production of the record. It merges the previous rights, and gives the judgment creditor convenient remedies not before his, as the right to issue execution, the creation of a lien, and the like. (Anson on Cont. p. 45.)

Sec. 437. CONSIDERATION NEED NOT BE EXPRESSED, BUT MUST BE PROVED.—As a general rule no consideration need be expressed in a written contract and one may be shown to have passed. (Tingley v. Cutler, 7 Conn. 291; 1 Pars. Cont. 430.) Where a contract states that it was made for valuable consideration, this is prima facie evidence of consideration only, and may be disproved. By statute in a number of States written instruments are made presumptive evidence of consideration, and are thus placed on the same footing as bills of exchange and promissory notes, requiring the party contesting the validity of the contract to show lack of consideration. (Beach on Cont., Sec. 150.)

Sec. 438. KINDS OF CONSIDERATION.—Under the Roman Civil there were four kinds of consideration, as follows: "Do ut Des," money or goods to receive money or goods; "Facio ut Facias," work for work or an act for an act, as mutual promises; "Fa-

dio ut Des," work for a price, express or implied; "Do ut Facias," price or wages for work. (2 Bl. Com. 444.)

Consideration at common law may be "good," "valuable," or "full and valuable." The common law also recognized that a consideration may consist of a benefit to the promisor, or of a detriment, or loss suffered by the promisee. (Pars. Cont. pp. 430-1.)

Sec. 439. SAME SUBJECT—"GOOD" CONSIDERATION.—A "good" consideration is defined by Blackstone by giving an example of it, "as that of blood, or natural affection, when a man grants an estate to a near relation; being founded on motives of generosity, prudence and natural duty." And he further observes that "deeds made upon good consideration only are considered as merely voluntary, and are frequently set aside in favor of creditors and bona fide purchasers." (2 Bl. Com. 297.) It was early held that a person might make a binding promise to another to do something for the other's son or daughter, and that the relationship would entitle the party to be benefited to sue upon the contract. But this is no longer law, and it is held that the party suing upon a promise must show that the consideration for the promise was some benefit conferred or detriment sustained by himself. (Anson on Cont. p. 78; Contra Emmitt v. Brophy, 42 Ohio St. 82.) And generally, blood, or natural affection is not such a consideration as will support a promise.

Sec. 440. SAME SUBJECT—VALUABLE CONSIDERATION.—A valuable consideration "is such

as money, marriage or the like, which the law esteems an equivalent given for the grant." (2 Bl. Com. 297.) Valuable usually means a money consideration or its equivalent, marriage being the chief exception to this. (Pars. Cont. p. 431.)

Sec. 441. SAME SUBJECT—FULL AND VALUABLE CONSIDERATION.—A full and valuable consideration is one which is a just equivalent for what is given or promised.

A valuable consideration is good in law, and as between the parties can only be attacked for such gross inequity as amounts to fraud, or constitutes a fraud as against the creditors of the contracting parties. If the consideration is full and valuable, it cannot be attacked in equity by antecedent creditors, unless the contract was made with knowledge of their claims and is void for want of good faith.

Sec. 442. VALUABLE CONSIDERATION NEED NOT BE ADEQUATE.—If a consideration be valuable it need not be adequate, since the court does not require the consideration and the thing to be done to be in exact proportion, one to the other. A party may drive a good bargain, so long as he does it without deceit or fraud. But the consideration must have some real value, and if this be very small, that fact of itself, or with other circumstances, indicates a fraud upon the promisor. And though courts hesitate to disturb contracts on account of inadequacy of consideration, yet if the agreement be unconscionable, though not to a degree to be a fraud, yet equity would not specifically enforce it, and the law would only give rea-

sonable damages for a breach of it. (1 Pars. Cont. 437; Nash v. Lull, 102 Mass. 60.)

Where a consideration fails or is of no real value, as where one promises under a mistake as to an obligation supposed to be imposed by law, the contract fails. And the adequacy of consideration, when called in question, is for the court to pass upon. (Homer v. Ashford, 3 Bing. 437.)

Sec. 443. CONSIDERATION ARISING FROM MORAL OBLIGATION DISCUSSED.—By moral obligation is to be understood one which derives its sanction from the moral law, and which is not legally enforceable. Such obligations may arise from benefits received in the past, from motives of piety, conscience and friendship, and from the rules of honor and duty among men as social beings. Thus a man is bound in honor to pay money lost in wager, but he is not legally bound because the law makes gambling illegal. Now is this moral obligation, however arising, sufficient consideration to support a promise to pay for it from the person so obligated? The rule is, that a moral obligation is insufficient to support a promise unless the pre-existing obligation is one which has become inoperative by the interference of a rule of positive law, as a statute of limitations, the law protecting infant's contracts and the like. (Pars. Cont. p. 437; Philpot v. Gruninger, 14 Wal.. 570; Osier v. Hobbs, 33 Ark. 215.) And the new promise in such case must be distinct and specific, and will not be inferred from the payment of interest on a note, or from statements to third persons of promises to pay a debt which is barred.

So where services have been rendered without the request of the party to whom they are rendered, and without expectation of payment, a subsequent promise to pay for them is unenforceable for lack of consideration. (Bartholomew v. Jackson, 20 Johns. 28; Allen v. Bryson, 67 Ia. 591.)

Where one is under a moral and legal obligation to do a thing, and another does it for him under circumstances of decency and humanity admitting of no delay, the law implies a promise to pay for such service.*

Sec. 444. EXAMPLES OF VALID AND SUFFICIENT CONSIDERATIONS.—The following are held to be valid and sufficient considerations: (a) The prevention of litigation, as the mutual submission of a controversy to arbitration, both being bound, the mutual promises being a consideration each for the other; (b) a compromise when mutual; and the courts will not enter into and estimate the value of the different claims submitted, as the law favors the settlement of disputes (Hodges v. Saunders, 17 Pick. 470); (c) a promise to pay a debt if proved, or to pay a debt if the party would swear to it, where it has been denied; and in this case the fact that the party swore falsely is no defense (Brooks v. Ball, 18 Johns. 337); (d) a liability incurred by reason of the promise of another; (e) a promise to do a thing which the party is under legal obligation to do.

*Force v. Harris, 17 N. J. L. 385, where a person paid the funeral expenses for the wife of another, and a promise to repay was implied. And see Bentley v. Lamb, 25 Am. L. Reg. (N. S.) 632.

So the assignment of a debt or engagement is a good consideration for the promise of the assignee, but if the assignment is illegal or void for any reason, as in fraud of creditors, the promise fails, because of failure of consideration. And this is true, in general, in every case of failure of consideration, except in the case of negotiable instruments which have passed into the hands of a bone fide holder for value.

A surrender of a suit or proceeding to try a disputed legal question is a good consideration for a promise to pay a sum of money for so doing, and in these cases mere inequality of consideration does not constitute a valid objection. But if the promise was to pay money to abandon a suit in which the public are interested, it is not enforceable, as such a promise would be against public policy. (1 Pars. Cont. 440.)

Sec. 445. SAME SUBJECT—FORBEARANCE. —To forbear for a time to bring proceedings at law is a valid consideration for a promise. But such a consideration fails if the claim is wholly false, and clearly unsustainable at law or in equity, though if the claim is merely doubtful the consideration would be good. The proceeding or suit need not have been commenced. The time for which the delay is granted ought to be definite; but a general agreement to forbear all suits is construed to be a perpetual forbearance. The party making the promise need not have a direct interest in the suit which is delayed; it is sufficient if he requests the delay, as the detriment suffered by the creditor makes a valid consideration for the promise. The

waiver of any enforceable right at the request of a person is a valid consideration for a promise, and this is true though the right waived be an action for a tort. (1 Pars. Cont. 442-4; Beach on Cont., Sec. 168; Von Brandenstein v. Ebensberger, 71 Tex. 267.)

Sec. 446. SAME SUBJECT—WORK AND SERVICE.—Work and service is always a sufficient consideration when rendered at the request of the party promising, and is a frequent form of consideration. The request to do the work or service may be implied, and generally is so when the party accepts and holds the benefit of the work or service.

So if the promisor requests that service be done for a third party, it is consideration for his promise. But a subsequent promise to pay for work done as a mere gratuity, and which has not been requested, is void for want of consideration.

Where the requested service is not done, but some other, there is no implied promise to pay for such work, and it must be afterwards accepted to bind the employer. (1 Pars. Cont. 446.)

A promise for a promise is a good consideration. And this is so previous to performance or without performance, as mutual promises to marry, to become partners, and the like; the promises being each the consideration for the other. Such promises are usually concurrent in point of time. Each party must be bound to fulfill his promise. So where the promise on the part of an apprentice to remain a certain time was given without the master promising to instruct

the apprentice, the contract was void for want of mutuality. (1 Pars. Cont. 448.)*

Sec. 447. UNREAL CONSIDERATIONS.—A consideration which is impossible or so vague in terms as to be practically impossible will be treated as unreal. (Harvey v. Gibbons, 2 Lev. 161; Stevens v. Coon, 1 Pinney (Wis.) 357.) As regards vagueness, the principle is, that what can be made certain, is certain; so a contract to sell all the straw one has to spare, not exceeding three tons, is not void for uncertainty, as the quantity to be sold can be determined. (White v. Herman, 51 Ill. 243; Parker v. Pettit, 43 N. J. L. 512; Thompson v. Stevens, 71 Pa. St. 161; Kaufman v. Farley Mfg. Co., 78 Ia. 679.)

And the consideration is treated as unreal where it consists of a promise to do, or the doing of a thing which a man is legally bound to do, for the promisor is getting nothing more than he is entitled to without the promise. (Robinson v. Jewett, 116 N. Y. 40; Sullivan v. Sullivan, 99 Cal. 187.) Likewise a promise not to do what a man legally cannot do is an unreal consideration. (Anson on Cont. p. 83.)

Sec. 448. SAME SUBJECT—PART PAYMENT IN DISCHARGE OF WHOLE.—A promise to re-

*Where the contract is binding upon only one of the parties it is generally void for want of mutuality. Thus where an agreement is made to submit a dispute to arbitration, and it is only signed by one of the parties, the one not signing, not being bound, can not enforce it against the other. An exception to this rule is found in the contracts of infants, where the infant is not bound because of its infancy, while the adult contracting with him is bound.

linquish part of a debt, or take part in discharge of the whole is a nudum pactum and without legal obligation. (Day v. Gardner, 42 N. J. Eq. 199.) "The payment of a smaller sum in satisfaction of a larger is not a good discharge of a debt.* It is, in fact, doing no more than a man is already bound to do, and it is no consideration for a promise, express or implied, to forego the residue of the debt. There must be something different to that which the recipient is entitled to demand, in the thing done or given, in order to support his promise. The difference must be real, but the fact that it is slight will not destroy its efficacy in making the consideration good. * * * Thus the giving a negotiable instrument for a money debt, or the gift of a horse, a hawk or a robe, in satisfaction is good." (Anson on Cont. p. 83.)

Where the damages for the breach of a contract are uncertain, a payment of a certain sum is a valid consideration for the promise to forego a larger but uncertain amount. (Potter v. Douglass, 44 Conn. 541; Goss v. Eliason, 136 Mass. 503; Bedell v. Bissell, 6 Col. 162.) If the damage is certain in amount, then the

*Railroad Co. v. Davis, 35 Kan. 464; Gould v. Buller, 127 Mass. 386; Singleton v. Thomas, 73 Ala. 205. The rule is considered a technical one, and generally criticised by the courts. It is limited to its precise import, and every opportunity taken to evade it; thus if the payment of the less sum is made before the debt is due, or at a different place from the one stipulated, or any collateral benefit received by the creditor, which would raise a technical legal consideration, however small, it is held sufficient to support the agreement. (Harper v. Graham, 20 Ohio, 105; Varney v. Conroy, 77 Me. 527.) See Knowlton's Ed. of Anson, p. 83n.

promise to forego such claim, or a portion of it, is only supported by giving something different in kind, or by a payment at an earlier date. And whether certain or uncertain, the consideration for the promise to forego must be executed, that is, carried out, as an accord and satisfaction. (Anson on Cont. p. 85; Daniels v. Hollenbeck, 19 Wend. 408; Summers v. Hamilton, 56 Cal. 593.) For a modification of this latter rule, see Whitsett v. Clayton, 5 Col. 476; Schweider v. Lang, 29 Minn. 254.

A composition by a debtor with his creditors, by which each agrees to take a part in satisfaction of the whole of his claim is an apparent exception to the rule that part payment will not discharge the whole debt. It is said that in the case of a composition with creditors, the consideration is the agreement between the different parties, forming in reality a new agreement, with different parties, and for a previous debt.*

Sec. 449. CONSIDERATION VOID IN PART.—Where the consideration is void in part, and is entire in character and inseparable, then the whole contract fails. Equally so, if a promise is entire and not in writing, when a part of it is required to be in writing by the statute of frauds, it fails entirely because of the void part. But where the consideration is separable, or there are several considerations, and one is frivolous or fails, but is not illegal, the contract may stand because of the rest, unless the remaining considerations are inadequate.

(Goodman v. Cheesman, 2 B. & Ad. 328; Murray v. Snow, 37 Ia. 410; Robert v. Barnum, 80 Ky. 28.)

If any part of a consideration, whether entire or separable, be illegal, the promise will fail because it is against public policy to enforce a promise obtained by an illegal act. Thus where a promissory note was given in payment of an account, some of whose items were for groceries, and others for liquors sold in violation of the statute, it was held that the note was void entirely. (Widoe v. Webb, 20 O. St. 431.)

Sec. 450. EXECUTORY, EXECUTED AND PAST CONSIDERATIONS DISCUSSED.*—1. An executory Consideration refers to a future act; thus, a promise for a promise constitutes a contract upon executory considerations. Either may perform, or offer to perform, and thus bind the other, to fulfill or compensate for the breach.

2. An executed consideration arises where one of two parties has, either in the act which amounts to a proposal, or the act which amounts to an acceptance, done all that he is bound to do under the contract, leaving an outstanding liability on the other party only. (Anson on Cont. p. 90.)**

* The student should take notice that these terms, executed and executory, are not used in the same sense by all legal writers; thus Walker uses "executed" in the sense of "past" (Am. Law, p. 439), as do a number of other writers. (Bish. on Cont. Sec. 440; 1 Pars. Cont. 468.)

** If a thing is done at the time a promise is given the consideration is executed; if there is only a promise to do it in return for another promise, the consideration on both sides is executory. A contract with an executed consideration is unilateral; if there are two promises, each being the consideration for the other, the contract is bilateral. (Farrington v. Tenn. 95 U. S. 679, 683.)

3. "A past consideration is some act or forbearance in time past by which a man has benefited without thereby incurring any legal liability. If afterwards, whether from good feeling or interested motives it matter not, he makes a promise to the person by whose act or forbearance he has benefited, and that promise is made upon no other consideration than the past benefit, it is gratuitous and cannot be enforced; it is based upon motive and not upon consideration." (Anson on Cont. p. 92; Osier v. Hobbs, 33 Ark. 215; Ludlow v. Hardy, 38 Mich. 690.)

The exceptions to the rule that a past consideration is, in effect, no consideration, are as follows: 1. Where the past consideration was given or rendered at the request of the promisor, or the circumstances and beneficial nature of the consideration implied a request, such consideration will support a subsequent promise. (Pool v. Homer, 64 Md. 143; Oatfield v. Waring, 14 Johns. 188; O'Connor v. Beckwith, 41 Mich. 657.) 2. Where a person has voluntarily done what another was legally bound to do; this, though a past consideration, is sufficient to uphold an express promise to recompense such voluntary act. This exception is founded upon the rule that a subsequent ratification of a voluntary act amounts to a previous authority. (Gleason v. Dyke, 22 Pick. 393.) 3. Where a person has received a benefit in the past, but by rules of law, incapacity to contract, or lapse of time, his promise then made is not enforceable against him, such promise may be revived when the law is changed or the incapacity removed. The principle being "that where the consideration was

originally beneficial to the party promising, yet if he be protected from liability by some provision of the statute or common law, meant for his advantage, he may renounce the benefit of that law; and if he promises to pay the debt, he is then bound by the law to perform it." (Parke, B., in Earle v. Oliver, 2 Exch. 71.)

We have seen (Section 443, Ante) that the doctrine of moral obligation as a consideration covers these cases, and so some cases hold. (Stafford v. Bacon, 25 Wend. 384.) But later cases abandon the doctrine of moral obligation. (Bishop on Cont., Sec. 100.)

Sec. 451. FAILURE OF CONSIDERATION DISCUSSED.—A consideration may apparently be valuable and sufficient, and turn out to be no consideration at all, or before the contract is executed it may fail. (1 Pars. Cont. 462.) If the thing to be done is in its nature separable and divisible, and there is no understanding which makes it entire, the part which fails not going to the essence of the contract, it is good in part, and the failure in part will not destroy the residue. (Lucas v. Godwin, 3 Bing (N. C.) 746.) Some contracts are by their nature and intent not to be avoided by reason of a slight or immaterial variation of failure in the consideration, as in the sale of lands where a definite number of acres are called for, followed by the words "more or less." A total failure of consideration invalidates the contract, and money paid out on account of it may be recovered. But except in case of mistake of fact, money paid voluntarily by a person who knows fully what bargain he is making, cannot be recovered. (1 Pars. Cont. 466.)

III.—PARTIES TO CONTRACTS.

Sec. 452. IN GENERAL.—As contract results from agreement, and agreement requires two or more assenting minds, it follows that there must be at least two parties to every contract. The parties to a contract may be individuals, or aggregations of persons, as corporations, partnerships and the like; they may act for themselves, or represent others as their agents, attorneys, servants, and the like; they may act jointly or severally. But at present we are not concerned with these distinctions. For the purpose of the formation of a valid contract there must be parties capable of contracting, and it is our purpose to find out who are thus capable, or, rather, to find out who are incapable, as all persons are presumed competent to contract, and disability where it exists, must be set up when relied upon as a defense to a contract.

Sec. 453. PERSONS INCAPACITATED TO MAKE CONTRACTS.—Some persons by the policy of the law, and for their own benefit, are incapacitated from binding themselves by contract. The incapacity may be entire or partial, and arises from a variety of causes, as infancy, coverture, imbecility, political status, and the like.

Sec. 454. SAME SUBJECT—INFANCY.—A person under the age of majority, which age is usually regulated by statute, is presumed not to have attained to such years of discretion as to be able to assent or agree, and because of this he is allowed the privilege of avoiding contracts made during infancy, except those which are made for necessaries. This subject has been

fully discussed in a previous number of this series and will not be repeated here.*

Sec. 455. SAME SUBJECT—MARRIED WOMEN.—At common law, except as to their equitable separate estate, married women were unable to make a valid contract either to bind themselves or to acquire rights thereby, but this disability is now removed by statutes in the several States, and with a few exceptions married women may contract as though single. For this subject in more detail the student is referred to the chapters on "Husband and Wife," in No. 3 of this Series.

Sec. 456. SAME SUBJECT—PERSONS MENTALLY DEFICIENT.—Idiots, lunatics and imbeciles cannot make binding contracts. This follows from the nature of a contract; persons having no mind cannot contract, as an act of mind is required. But as there are many degrees of mental unsoundness, varying from mere weakness of intellect to entire incapacity, it is sometimes difficult to say just what cases are void for lack of mental capacity.

In general, to invalidate the contract there must be such mental disability as from its character and intensity disables the person from understanding the nature and effect of his acts. So mere mental weakness or disability from old age, if not to the extent just stated, will not invalidate a contract entered into by a party so affected. (1 Pars. Cont. 383.) And even an insane adult may become liable on an implied contract for necessaries.

*Home Law School Series, No. 3, Secs. 378-380.

The insanity to avoid the contract must exist at the time of entering into it, and though the party afterwards recover his mind he may repudiate a contract made while insane. Though the mental incapacity be caused by the party's own fault, as by his drunkenness, he may still avoid the contract unless his intoxication was part of a scheme to defraud. (1 Pars. Cont. 384.)

Contracts of Lunatics. A lunatic is a person once of sound mind but who has lost his mental capacity through sickness or accident. He may avoid all his contracts save those bona fide made for necessaries. The term "necessaries" here meaning the same as in the case of infants—all proper things as well as indispensables. His contracts, except those for necessaries, may be avoided by his guardian or other representative if he were actually insane at the time of making the contract, though he was seemingly sane and no unjust advantage was sought to be taken of him.*

The law aims to protect insane persons or those mentally incapable of caring for themselves, but not those who are merely ignorant or careless. So one who, lacking ordinary intelligence or shrewdness, makes a bad or foolish bargain, may not avoid it on the ground of his incapacity. (1 Pars. Cont. 387.)**

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*Rev. Stat. of Ohio, Secs. 6302-6317.

**Spendthrifts. Persons incapable by reason of extreme prodigality to preserve their property may be put under guardianship, and thus lose the right to make contracts. And this is true of habitual drunkards. See Rev. Stat. Ohio, Sec. 6317.

Seamen. These are protected by law from their own carelessness both as regards their person and rights. The U. S.

Sec. 457. SAME SUBJECT—ALIENS.—An alien is a person born out of the jurisdiction of a country in which he lives and not naturalized therein. By a rule of law and construction the children of ambassadors, ministers, etc., though born out of the jurisdiction of their country, are yet citizens. And children born to citizens while temporarily sojourning in a foreign country are citizens of their parents' country, but they may elect to become citizens of the country where born.

Aliens at common law could not hold real property, and their right to personal property was precarious. The rights of aliens to hold real property are regulated by the States, and with a few exceptions, where they have been limited as to the amount they might acquire in each county, they have the same right to acquire and hold property as citizens. The Congress of the United States has the power to confiscate the goods and properties of alien enemies, and in time of war may give the subjects of the power with whom we are at war a stated time to remove from our territory. But until so ordered out an alien may sue and be sued in our courts, both in peace and war; but they must obey the laws and are amenable to all laws of the jurisdiction in which they live. (Clark v. Morey, 10 Johns. 68; Brook v. Filer, 35 Ind. 402; McVeigh v. U. S., 11 Wall. 256.)

Rev. Statutes, Sections 4554-4591, contain many provisions for their protection and benefit. And an agreement by a seaman to shipping articles which do not contain the general rights and privileges prescribed for such articles is void. (1 Pars. Cont. 390.)

During the war of rebellion, the inhabitants of the Northern and Southern States were enemies, and all contracts made between them during the continuance of hostilities were void. (Materson v. Howard, 18 Wall. 99; Mutual Ins. Co. v. Hilliard, 37 N. J. L. 444.) Contracts existing before the war were not ended or void, but the remedy was suspended, until peace was restored. (University v. Finch, 19 Wall. 106; Cohen v. New York Mutual Lifee, 50 N. Y. 610.)*

IV.—LEGALITY OF THE SUBJECT-MATTER.

Sec. 458. THE SUBJECT-MATTER AS AN ELEMENT IN A VALID CONTRACT.—In general the parties may contract about whatever they choose. This freedom of contract is limited only in this, that public policy refuses to sanction the contracts of the parties made along certain lines, and though all other requisites of a valid contract be present if the parties have in contemplation one of these prohibited objects it will not be enforced. Again, the law may prescribe certain formalities to be followed by the parties in making certain contracts, and unless these are followed as pre-

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*At common law persons convicted of treason or felony or excommunicated were incapacitated from contracting, but these common law disabilities have never prevailed in this country.

Barristers and Physicians. By the common law barristers and physicians could not sue for professional services rendered, whether upon an implied or express contract. This rule has never prevailed in the United States, and attorneys and physicians have the same right to sue and recover upon contracts as others.

scribed the contract is not enforceable. The classes of objects which the law refuses to sanction are those which are immoral, impolitic, or illegal; those for which it prescribes formalities and refuses to sanction if the formalities are not followed, come under the head of fraudulent contracts, and the statute prescribing the formalities is known as the "statute of frauds." The nature and effect of these objects and formalities we shall now discuss.

Sec. 459. IMMORAL AGREEMENTS.—Where the undertaking on either side is to do or permit something decidedly immoral, as prostitution, making indecent books or pictures, and the like, the law will not aid either party in enforcing the contract. But the law will not avoid contracts merely indelicate, and if the contract is to be avoided it must grow immediately out of or be connected with the illegal or immoral act. The question of Morality is not always open to discussion, and, in general, only those contracts will be held void for immorality which the precedents have decided to be immoral.*

Sec. 460. IMPOLITIC AGREEMENTS.—Agreements or contracts against public policy are such as the precedents have established to be so. Like the question of morality, the question of what constitutes an

*Chitty on Contracts, 577-9; Forsyth v. State, 6 Ohio, 19; Hawks v. Naglee, 54 Cal. 51; Smith v. Richards, 29 Conn. 232; Wallace v. Rappleye, 103 Ill. 249. A promise under seal in consideration of past cohabitation has been sustained in cases. (Brown v. Kinsey, 81 N. C. 245; Wyant v. Lesher, 23 Pa. St. 338.)

impolitic object of contract is not to be canvassed for every contract, and unless there is some recognized authority that a certain contract is contrary to settled public policy this is not a good defense.

Among the contracts which are adjudged impolitic and void are: Contracts in restraint of marriage or trade, that is, in general restraint of marriage or trade, for a contract not to marry a particular person, or not to go into a certain trade in a limited district may be good. Agreements in restraint of marriage are discouraged for political and moral reasons; so a promise under seal to marry no one but the promisee, where there was no promise of marriage on either side was held void, as being purely restrictive. (Anson on Cont. p. 187; Chalfact v. Payton, 91 Ind. 202.) So marriage-brocage contracts, or promises to pay money for bringing about marriages, are against public policy. And agreements looking to the future separation of husband and wife are also illegal. (Phillips v. Thorp, 10 Oreg. 496; Johnson v. Hunt, 81 Ky. 322; Randall v. Randall, 37 Mich. 571.)

Until about 1870 it was settled law that a contract in which one of the parties agreed not to carry on a particular business within a State was void as in restraint of trade. (Taylord v. Blanchard, 13 Allen 370.) But now the rule is modified, the restraint, it is said, may extend far enough to afford a fair protection to the purchaser of a business, and this may include the territory of a State. (Beal v. Chase, 31 Mich. 490; Chappel V. Brockway, 21 Wend. 162; Arnold v. Kreutzer, 67 Ia. 214.) But if there is no limitation as to the territory

the contract is void. (Thomas v. Miles, 3 Ohio St. 274; Wiley v. Baumgardner, 97 Ind. 66.) The contract may be unlimited as to time.

Contracts to stifle or prevent a criminal prosecution, or to induce an officer not to perform his duty are against public policy. (McMahon v. Smith, 47 Conn. 223.)* So are lobbying contracts, or agreements to advocate a claim with members of the legislature or secure legislation through personal influence or by corrupt measures. (Trist v. Child, 21 Wall. 441; McBratney v. Chandler, 22 Kans. 692.) So are contracts to withdraw opposition to a divorce proceeding. (Stoutenburg v. Lybrand, 10 O. St. 228.) So is the sale of a public office, or the assignment of his salary before due by a public officer. (Hall v. Gavit, 18 Ind. 390; Morse v. Ryan, 26 Wis. 356; Bliss v. Lawrence, 58 N. Y. 442; 66 Cal. 72.) And agreements in which the parties are bound to submit all disputes arising therein to arbitrators are void as being attempts to oust the courts of their jurisdiction. (D. & H. Canal Co. v. Pa. Coal Co. 50 N. Y. 250; Reed v. Washington Ins. Co., 138 Mass 572.) But the parties may stipulate for the determination of specific questions by arbitration, as the amount of damages sustained by a breach, and make such determination, or a bona fide effort to obtain it, a condition precedent to the right of action on the contract. (Mentz v. Armenia Fire Ins. Co., 79 Pa. St. 480; Phoenix Ins. Co. v. Badger, 53 Wis. 288.)*

*Stifling Prosecutions. "You shall not make a trade of a felony. If you are aware that a crime has been committed you shall not convert that crime into a source of profit or

Sec. 461. ILLEGAL AGREEMENTS.—By an illegal agreement or contract is meant, not one lacking some of the legal requisites of a binding contract, but one, the subject-matter of which is in contravention of some positive law. (Walker, Am. Law, 467.) The principle being that if the general intent of the legislature as determined from a penal statute forbidding an act to be done under penalty, is to prohibit the act, or to protect the public health or morals, then any contract to do such act is invalid, whether the statute declares so or not.*

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benefit to yourself." (Per Lord Westbury, in Williams v. Bayley, L. R. 1 H. L. 220.) This rule Anson states to be subject to the qualification, "that where civil and criminal remedies co-exist, a compromise of a prosecution is permissible." (Anson, on Cont. p. 185.) By statute in many of the States the parties are permitted to compromise misdemeanors. In the absence of statute the parties cannot as a part of their agreement settle an offense against the State, and if this is part of the consideration the agreement is void. (Oxford Nat'l Bank v. Kirk, 90 Pa. St. 49; Wheaton v. Ansley, 71 Ga. 35; Reed v. McKee, 42 Ia. 689.)

Maintenance and Champerty. Maintenance, by which is meant the maintaining a suit or quarrel to the disturbance or hindrance of right, and Champerty, or the maintenance of the suit of another for a share of the proceeds, are against the policy of the common law, and agreements of this kind which tend to encourage litigation were void. But the common law regarding maintenance and champerty does not prevail in many of the American States. (Richardson v. Rawlins, 40 Conn. 571; Bentinck v. Franklin, 38 Tex. 458; Wright v. Meek, 3 Ia. 472.) In others the common law rule does prevail. (McCall v. Capehart, 30 Ala. 521.) Champerty is no defense to the action which is being aided or maintained, but only to the enforcement of the champertous agreement. (Barnes v. Scott, 117 U. S. 582.)

*Vining v. Bricker, 14 O. St. 331; Dillon v. Allen, 46 Ia.

An agreement or contract to commit any of the crimes mentioned in the penal code of the State, or to break or infringe any law of the State or country is void and unenforceable. (Clement's Appeal, 52 Conn. 464; Hatch v. Mann, 15 Wend. 44.) By statute in the several States all species of gaming contracts or wagers are declared void. (Rev. Stat. Ohio, Sec. 4269.) Just what are wagering contracts is not always clear.*

299. If the statute expressly prohibits an agreement there can be no question as to its illegality. If a penalty is imposed for the doing of a particular act, some cases hold that an agreement to do that act is impliedly prohibited and illegal. (Pray v. Burbank, 10 N. H. 378; Kleckly v. Leyden, 63 Ga. 315.) Others hold that the legislative intent is to be determined, and this is done by ascertaining the object of the penalty. If the penalty is solely to facilitate and secure the collection of the revenue, it is possible that the contract, though penalized, is not forbidden. So the continuity of the penalty may indicate the legislative intent. If imposed once for all on the doing of a thing, an agreement to do the thing may be valid, but if the penalty is recurrent at each breach of the statute, then the object is illegal and an agreement made contrary to it is void. (Anson on Cont. p. 172; Corning v. Abbott, 54 N. H. 471; Aiken v. Blaisdell, 41 Vt. 668.)

*Wagering Contracts. "A wager is a promise to pay money or transfer property upon the determination or ascertainment of an uncertain event; the consideration for such promise is either a present payment or transfer by the other party, or a promise to pay or transfer upon the event determining in a certain way. The event may be uncertain because it has not happened, or it may be uncertain because it is not ascertained, at any rate to the knowledge of the parties. Thus a wager may be made upon the length of St. Paul's, or upon the result of an election which has already happened, though the parties do not know in whose favor it has gone. The uncertainty resides in the minds of the parties." (Anson on Cont. p. 174.)

At common law wagering agreements were enforceable (Gilbert v. Sykes, 16 East. 150); but in this country this principle of the common law has not prevailed

Stock Market Gambling. An agreement to purchase or sell for future delivery is a gambling contract and not enforceable where it is the intention of the parties that there shall be no actual sale of property, but that at the time set for delivery the parties will settle, and the purchaser pay or receive the gain or loss occasioned by the difference in the market price at the time of the agreement and the time of settlement. Such contracts are truly considered as immoral, illegal and contrary to public policy. They are nothing more than gambling deals. (Irwin v. Willair, 110 U. S. 499; Lyon v. Culbertson, 83 Ill. 33; Cockrell v. Thompson, 85 Mo. 510; Lowry v. Dillman, 59 Wis. 197; Whiteside v. Hunt, 97 Ind. 121.) They have been held to come within the State statutes against gaming, in Cunningham v. National Bank of Augusta, 71 Ga. 400. In Lester v. Buel, 49 Ohio, St. 240, it is held that a contract in which one of the parties is to have the option to buy or sell a certain commodity at a future time, it being understood that there was to be no delivery, the party losing to pay the other the difference in the market price, is by common law, as well as the statute in Ohio, a gambling contract or wager upon the future price of the commodity, and therefore void.

Bohemian Oats Contracts. What are known as Bohemian oats contracts are held to be fraudulent, immoral and against public policy. The law refusing to aid their enforcement while executory, nor aid either party when the contract is executed, to place himself in statu quo, but will leave the parties where it finds them. (Carter v. Lillie, 3 Ohio, C. C. 364; Shirey v. Ulsh, 2 Ohio, C. C. 401.)

Insurance Contract. The contract of insurance is an exception to the law against wagering contracts. Insurance is a wagering contract, but the law permits such contracts to be valid where the insured has what is called an "insurable interest" in the risk. See Anson on Cont. pp. 175, 180; Wood on Fire Ins. 90; Warnock v. Davis, 104 U. S. 775; 36 Albany Law J. p. 83.

and wagering contracts are illegal independent of statutes. (Love v. Harvey, 114 Mass. 82; Eldred v. Malloy, 2 Col. 320; Wilkinson v. Tousley, 16 Minn. 299.)

Usury, or the taking of greater interest than the law allows, may be made to avoid the contract. The rate of interest is prescribed by statute in the various States, and the penalty prescribed for taking a greater amount than the law allows. The taking of usurious interest does not now void the contract, but as a rule the interest above the legal rate is applied on the principal debt, or may be recovered by suit.*

Sec. 462. EFFECT OF ILLEGAL CONTRACT. —Where the contract is illegal it is void and the party

*Rev. Stat. Ohio, Secs. 3179-3183; 7 Ohio 80.

Computing Interest in Ohio. When a partial payment is made on an account drawing interest, if it exceed the interest due it is to be applied on the interest and the balance on the principal, if less than the interest it is to apply on the interest; and where interest is payable annually, such partial payment will be applied (1) on the interest due upon interest, (2) in satisfaction of interest accrued on the principal, and (3) upon the principal; but in no case will interest upon interest be made to bear interest. (Anketel v. Converse, 17 Ohio St. 11.) That is, interest due and unpaid draws simple interest until paid, but compound interest is not allowed.

On contracts for the payment of money evidenced by bond, bill, promisory note or other instrument in writing, the interest is payable from the stated time or from the day of maturity, but if the contract is to pay on demand, it has been held that interest does not begin until demand is made. On judgments, decrees, or orders, simple interest is to be computed from the date thereof. On book accounts the interest is computed on the balance found due at the date of settlement. (Walker, Am. Law, 471.) The contract to pay interest is interpreted according to the law of the place where it is to be paid. (Story, Confl. Laws, Secs. 291-301.)

promising is released from his promise whether made under seal or by parol, the defense of illegality is not a favor to either of the parties, but is allowed in the interest of the public. (Lyon v. Waldo, 36 Mich. 353; Buffendeau v. Brooks, 28 Cal. 641.)

Sec. 463. THE STATUTE OF FRAUDS.—The Statute of Frauds, so-called, requiring in certain cases written evidence of a contract, was passed in the 29th year of the reign of Charles II., being A. D. 1677. The statute was passed to prevent frauds upon third parties growing out of contracts, two sections of the act, the 4th and 17th, have been copied into the statute law of the American States in substance, if not in the exact terms.*

The 4th section of the statute provides:

"That no action shall be brought whereby to charge any executor or administrator upon any special promise to answer damages out of his own estate; or whereby to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person; or to charge any person upon any agreement made in consideration of marriage; or upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them; or upon any agreement that is not to be performed within the space of one year from the making thereof; unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized."

Sec. 464. CONSTRUCTION OF THE 4TH SECTION OF THE STATUTE OF FRAUDS.—It

*Rev. Stat. Ohio, Secs. 4195-99 (1810).

is said that the form required by the statute is not necessary to the existence of the contract but only to its proof. Hence the note in writing may be made at any time between the formation of the contract and the bringing of the action. And a draft made and signed by the proposer will be sufficient though the contract is concluded by a subsequent parol acceptance. (Anson on Cont. p. 55; Hardman v. Wolfstein, 12 Mo. App. 366.) The memorandum of the contract should mention or designate the parties. (Grafton v. Cummings, 90 U. S. 100; Dykes v. Townsend, 24 N. Y. 57.) Several writings, though made at different times, may be construed together to satisfy the statute as to the signed memorandum. If part only of such writings are signed, reference must be made in these to those unsigned unless it appears by comparison that they relate to the same matter. That is, the several writings must be consistent, connected and complete. (Thayer v. Luce, 22 O. St. 62; North v. Mendel, 73 Ga. 400.)

Whether the consideration must appear in the writing is a disputed question. The English rule is that it must, and this is followed in some of the American States. (Wain v. Warlters, 5 East. 10; Sears v. Brink, 3 Johns. 210; Taylor v. Pratt, 3 Wis. 674.) Other States hold that the consideration need not be expressed. (Reed v. Evans, 17 Ohio 128; Sage v. Wilcox, 6 Conn. 81; Ashford v. Robison, 8 Ind. 305.)

The memorandum must be signed by the party charged or his agent, it need not be signed by both parties. (McElroy v. Seerey, 61 Md. 389.) An auctioneer, being the agent of both parties, may bind them

by his signature, but his memorandum should be made at the time of the purchase. (Horton v. McCarty, 53 Me. 394.) The name may appear anywhere on the instrument, but must be for the purpose of authenticity. (Anderson v. Harrold, 10 Ohio 399.) The subject matter of the contract should be so described in the memorandum that it can be identified. (Wood v. Davis, 82 Ill. 311.)

Sec. 465. SAME SUBJECT—NATURE OF THE CONTRACTS IN THE SECTION.—The special promise to answer for the debt of another must be a promise to stand good for that which another person is primarily liable to pay. If no credit was given to the party receiving the benefit and the promisor alone is liable the promise is not within the statute and need not be in writing. (Wendell v. Hudson, 102 Ind. 521; Welsh v. Marvin, 36 Mich. 59; Morehouse v. Crangle, 36 O. St. 130.)

The agreement made in consideration of marriage does not include the promise to marry, but applies to a promise to pay money or make a settlement conditional upon a marriage taking place.

An interest in land within this section must be a substantial interest, and not arrangements preliminary to the acquisition of interest, as the cost of an abstract of title, or such a remote interest as the agreement to transfer shares in a railway company which owns land as incidental to its business. Again, "fructus industriales," or the fruits of industry produced by the labor of men, do not constitute an interest in land, while "fructus naturales," as growing grass, timber, or fruit

upon trees are considered to do so if the sale contemplates the passing of property in them before they are severed from the ground. (Anson on Cont. 61.)

Of agreements not to be performed within the space of a year it is to be said that the agreement must contemplate non-performance within the year, and by both parties. That is, the agreement would not be within the statute if the agreement is to be fully performed by one of the parties within the year. (Donneallan v. Read, 3 B. & Ad. 899; Winters v. Cherry, 18 Mo. 350; Smalley v. Green, 52 Ia. 241.) By judicial construction of the phrase "to be performed," this portion of the statute has been greatly restricted. The rule being that if the agreement by any possibility may be fulfilled or completed within the year it is not within the statute, and this though it is not likely to be, or expected to be, performed within the year. Thus contracts to be performed on the happening of an uncertain event, as on the death or marriage of a person, are sustained though not in writing. (Blakeney v. Goodale, 30 Ohio St. 350; Niagara Fire Ins. Co. v. Green, 77 Ind. 590.) So contracts to support a person during life or to educate a child, are held not to be within the statute, as the person may die within the year. (Bell v. Hewitt, 24 Ind. 280; Kent v. Kent, 62 N. Y. 560.) And a contract to restrain from doing an act or carrying on a business indefinitely are not within the statute, as the contract ends with the death of the individual, which may happen within the year. (Doyle v. Dixon, 97 Mass. 208.)

Sec. 466. SAME SUBJECT—EFFECT OF FAILURE TO SATISFY THE STATUTE.—A contract of the kind mentioned in this section which is not put in writing and signed is not void but cannot be proved. (Leroux v. Brown, 12 C. B. 801; Pritchard v. Norton, 106 U. S. 134.) But in those States which expressly provide that certain contracts "shall be void" unless put in writing, the failure to observe the statute would seem to go to the existence of the contract. The statute does not prevent the making of contracts without the written memorandum, but introduces a new rule of evidence and creates a new defense by requiring that the agreement shall be proved by a writing. (Crane v. Powell, 139 N. Y. 379.)

As a general rule, part performance will take a contract out of this section of the statute. This was the equitable rule to prevent a fraud being perpetrated under cover of the statute by the purchaser of land on a parol consideration, who sets up the statute to avoid paying for the land. (Brown on Stat. of Frauds, Sec. 441; Randall v. Turner, 17 O. St. 262.) The rule is subject to qualifications, and Anson states that it only applies where the contract is for an interest in land, and that even in this case the acts relied on to take it out of the statute must be more than service rendered in consideration of a promise to convey lands, or the payment of the price wholly or in part; the acts relied on as part performance must be unequivocally and in their own nature referable to some such agreement as is sought to be proved. (Anson on Contr. 63-4; Madi-

son v. Alderson, 8 App. Ca. 479; Crabill v. Marsh, 38 Ohio St. 331; Kinyon v. Young, 44 Mich. 339.)

Sec. 467. CONTRACTS WITHIN THE SEVENTEENTH SECTION.—The seventeenth section of the Statute of Frauds is as follows: "That no contract for the sale of any goods, wares, and merchandise for the price of 10 pounds sterling or upwards shall be allowed to be good, except the buyer shall accept part of the goods so sold and actually receive the same; or give something in earnest to bind the bargain, or in part of payment; or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contract, or their agents thereunto authorized." This section has also been copied substantially into the statute law of the several States, the amount being usually "$50 or upwards," instead of "10 pounds sterling."

Sec. 468. CONSTRUCTION OF THE 17TH SECTION.—In this section several methods are provided in which the contract may be validly made aside from the written memorandum. The same requisites for the memorandum are applicable in this case, as under the 4th section, with the exception that the authorities are unanimous that in this case the consideration need not be stated, the promise to pay a reasonable price, in the absence of a specified consideration, being presumed. (Anson on Cont. p. 65.)

There is some difficulty of determining just what constitutes goods, wares and merchandises under this section. In the contract of bargain and sale the property in the thing sold passes to the purchaser. Hence

there must be an ascertained and specific chattel contemplated by the parties to which nothing remains to be done; when this is so it is an executed contract of sale. But there may be an executory agreement to sell, as where the goods are not specific, or something remains to be done to complete the article or ascertain and fix the price, as the purchase of hay in the stack, which is to be weighed to ascertain the price. In this case the property does not pass to the purchaser, but only a right to have the agreement carried into effect.

The early English cases held that executory contracts of sale did not fall within the statute, and a subsequent act (Lord Tenterden's Act, 9 Geo. IV.) was passed to extend the section to executory contracts of sale for goods intended to be delivered in the future, or which had to be made, procured, or completed after the agreement. And by Lee v. Griffin, 1 B. & S. 272, it is held that the contract is within the section, and for the sale of goods if it contemplates the ultimate delivery of a chattel, notwithstanding the work and labor in the making or constructing such chattel is the most important part. This rule is hardly approved in this country. (Finney v. Apgar, 31 N. J. L. 270; Cooks v. Milliard, 65 N. Y. 360; Meinicke v. Falk, 55 Wis. 427.) The decisions in New York distinguish between the sale of goods in existence, when the contract is made, which are held to be within the statute, and those for goods to be manufactured, which are not within the statute. (Parsons v. Loucks, 48 N. Y. 17; Deal v. Maxwell, 61 N. Y. 652.) The sale of bonds, stocks and promissory notes are held to be within the statute,

(Tisdale v. Harris, 20 Pick. 13; Boardman v. Cutter, 128 Mass. 388.)*

Sec. 469. EFFECT OF FAILURE TO SATISFY THE 17TH SECTION.—The 17th section of the Statute of Frauds, unlike the 4th section, is said to go to the existence of the contract, and invalidate a contract within the section which is not made as it prescribes. (Leroux v. Brown, 12 C. B. 809; Houtaling v. Ball, 20 Mo. 563.) Anson questions the substantiality of this rule, and asserts that the words of the 17th section, which declare that the contract shall not "be allowed to be good," do not any more than the words of the 4th section relate to the existence of the contract. (Anson on Contract, pp. 67-8.)**

*This subject will be discussed at greater length in a subsequent number of this series, under the head of "Personal Property."

**The seventeenth section is not a part of the Ohio statute of frauds, Rev. Stat. Ohio, Secs. 4195-99.

CHAPTER III.

THE OPERATION OF CONTRACT.

Sec. 470. SCOPE OF THE CONTRACTURAL OBLIGATION STATED.—In general, it may be said that no one but the parties to a contract can be bound by it or entitled to rights under it. But under certain circumstances the rights and liabilities created by a contract may pass to a person or persons other than the original parties to it, either by the act of the parties, or by rules of law operating in certain events. (Anson on Cont. p. 208.) A discussion of these general principles will be the subject of the present chapter.

Sec. 471. A CONTRACT CANNOT IMPOSE LIABILITY ON A THIRD PARTY.—A contract acts upon the parties, and is founded upon their assent to its terms; it follows that one not a party, and not assenting to its terms, cannot be made to assume its obligation. So it is said "a man cannot, of his own will, pay another man's debt without his consent, and thereby convert himself into a creditor." (Durnford v. Messiter, 5 M. & S. 446.)

While it is true that a contract between parties cannot confer a liability upon a third party, yet the existence of such contract does impose a duty upon all persons extraneous to such contract not to interfere with its due performance. "A contract confers upon

the parties to it rights in rem (in the thing) as well as rights in personam; and it not only binds together the parties by an obligation, but it imposes upon all the world a duty to respect the contractual tie." (Anson on Cont. p 212.)*

The case of Lumley v. Gye, above cited, is followed in a number of American cases. (Dudley v. Briggs, 141 Mass. 584; Jones v. Stanley, 76 N. C. 355.) In this latter case it was said "the same reasons cover every case where one person maliciously persuades another to break any contract with a third person. It is not confined to contracts of service." Other cases hold that the doctrine of Lumley v. Gye, or Bowen v. Hall, does not generally prevail in this country, and state that a man "may advise another to break a contract, if it be not a contract for personal services. He may use any lawful influences or means to make his advice prevail. In such a case the law deems it not wise or practicable to inquire into the motives that instigate the

*Lumley v. Gye, 2 E. & B. 216. In this case, the plaintiff, manager of an opera house, having engaged a singer to perform in his theater, the defendant induced her to break her contract. The plaintiff sued the defendant for procuring the breach of contract, and the questions which the court passed upon were (1) whether an action would lie against one who procured the breach of any kind of a contract, and (2) if not, would an action lie in this case for the enticing away the servant from the master? The majority of the court answered both these questions in the affirmative. This case was decided in 1853, and in 1881 the case of Bowen v. Hall, 6 Q. B. D. 339, decided the uncertainty which still existed as to whether an action would lie for the securing the breach of a contract, independent of the relation of master and servant, by holding that such an action would lie.

advice. His conduct may be morally and not legally wrong."—Peters, J. in Haywood v. Tillson, 75 Me. 352. (Cooley's Torts, 279; 35 Albany L. J. p. 224.)

Sec. 472. A CONTRACT CANNOT CONFER RIGHTS ON A THIRD PARTY.—As a general rule it is stated that a contract between two or more persons cannot confer rights on a third person any more than liabilities, unless the contract amount to a declaration of trust. (Anson on Cont.)

This rule, which is thus positively stated on English authority, is modified by a number of exceptions resulting from the nature of the contract, the relationship of the third person to the promisee, and the statutes requiring actions to be prosecuted in the name of the real party in interest. So if the defendant has money in his possession which equitably belongs to the plaintiff, it is not a defense to the suit that the consideration did not move from the plaintiff, or that there is want of privity between the parties. (Lewis v. Sawyer, 44 Me. 332; Hosford v. Kanouse, 45 Mich. 620.) The principle that nearness of relationship between the promisee and the person to take a benefit under the contract will allow such third person to bring an action, though overruled in England, is followed by some cases. (Exchange Bank v. Rice, 107 Mass. 42.) The statutory or code provision, requiring actions to be prosecuted in the name of the real party in interest, gives the party for whose benefit a contract is made the right of action. So where a promise is made to a third party, and accepted by him, though he is not a party to the contract, he can yet assert his right under such

contract. (Emmitt v. Brophy, 42 Ohio St. 82.) Under the old rule the promisee would have been trustee for the party to be benefited. It is now quite generally held, and independent of code provisions, that a person may maintain an action on a parol promise made to another for his benefit. (Kimball v. Noyes, 17 Wis. 71; Flirt v. Cadenasso, 64 Col. 83; Hendrick v. Lindsey, 93 U. S. 143.)*

Sec. 473. A CONTRACT MAY BE ASSIGNED. —As we have seen a contract ordinarily affects only the parties to it. But by acts of the parties or by rules of law the parties may be replaced by others who then assume their rights and obligations.

Sec. 474. LIABILITIES UNDER A CONTRACT CANNOT BE ASSIGNED.—It is a general principle that a mere liability or debt cannot be assigned. (Cannon v. Kreipe, 14 Kans. 324; Van Scotter v. Leffets, 11 Barb. 140.) The rule is said to be based on sense and convenience. A party contracts with reference to the character, credit and substance of a particular person, and could this person place some one else in his place to make good his liability there would be no safety in contract. The limitations to this rule are: 1st, That the liability may be assigned with the consent of the party entitled, which is in effect the rescission, by

*Another exception to the general rule that a third person is not effected by the contract between others, is that of Agency. In this class of contracts the agent represents the third party and of course may contract so as to involve his principal. This subject is to be treated at length in a subsequent number of this series.

agreement, of one contract and the substitution of a new one with different parties; 2d, where the contract engages the party to do work which is not dependent upon the special skill or ability of the party, the work may be done by some other person equally competent, but the original party is liable if the work is not done as agreed; 3d, where an interest in land is transferred, liabilities attaching to the enjoyment of the interest pass with it. (Anson on Cont. p. 219.)

Sec. 475. ASSIGNMENT OF RIGHTS—AT COMMON LAW.—The benefits or rights under a contract may be assigned. But at Common Law, except in the case of negotiable instruments, the rights under a contract cannot be assigned so as to enable the assignee to sue upon it in his own name, the action must be brought in the name of the assignor, or his representatives. By a novation, or substituted agreement, the parties might discharge the old agreement and substitute a new one. Thus, if A owes B a certain amount and B owes C the same amount, an agreement between the three that A shall pay C instead of B, and C shall accept A's payment instead of B's will be such a new agreement as will substitute C for B, the latter being discharged. The mutual promises constitute the consideration for the new agreement, hence there must be a definite agreement between the parties and the assignee. (Forter v. Pain, 63 Ia. 85; Am. Lumber Co. v. Mulcrane, 55 Mich. 622; Murphy v. Hanrahan, 50 Wis. 485.)

Sec. 476. SAME SUBJECT—IN EQUITY.—In equity the rights under a contract may be assigned and

the assignee maintain a suit upon it in his own name. The only exception to this is in the case of a contract for personal services, the right to which may not be assigned. The assignment to be supported in equity, and a suit maintained upon it, must conform to certain conditions. These are: 1. A consideration must have been given by the assignee. 2. The person obligated under the contract is not liable until he has notice of the assignment, otherwise the assignment is valid from the moment made. 3. The assignee takes subject to all defenses that might have been set up against the assignor. (Anson on Cont. p. 222.)

As regards notice, it is held that a payment by the debtor to his creditor without notice of the assignment of the claim is a good discharge. And that as between successive purchasers of a chose in action he who first gives notice to the debtor will be entitled to payment. (Judson v. Corcoran, 17 How. 615; Murdock v. Dickson, 21 Mo. 138.) But some cases hold that purchasers take title according to the priority of time, regardless of notice to the debtor. (Thayer v. Daniels, 113 Mass. 129; Summers v. Huston, 48 Ind. 230.)

The rule as to the assignee taking subject to all defenses good against the assignor may be varied by the express agreement of the parties, providing that an assignment shall be free from equities.

Sec. 477. SAME SUBJECT—BY STATUTE.—Choses in action, or rights arising from contracts are made assignable by statute in the several States, but the statutes are not uniform in their terms or construc-

tion. The statutes usually require the suit to be brought in the name of the real party in interest, and this authorizes the assignee to bring the action in his own name.

The rules applicable to assignments in equity apply largely to the cases of statutory assignments. Every right of property which was assignable in equity and survives to the personal representatives of the owner is assignable under the statutes. (Hoyt v. Thompson, 5 N. Y. 320; Grand v. Ludlow, 8 O. St. 37.) The right and duty to render personal service cannot be assigned. (Chapin v. Longworth, 31 Ohio St. 421; Palo Pinta Co. v. Gano, 60 Tex. 249.) The right of action for a tort is not generally assignable, except such actions for torts as survive to the personal representatives. (Stewart v. Railway Co. 62 Tex. 246.) Actions for deceit, breach of promise of marriage, negligent injury to the person, malicious prosecution and the like are not assignable. (Dayton v. Fargo, 45 Mich. 153; Ward v. Blackwood, 41 Ark. 295.)

The creditor can assign his claim without the assent of his debtor, but if the debtor has the right to pay the claim as a whole, a part of it cannot be assigned without his assent. (Madeville v. Welch, 5 Wheat. 277.) No particular form of assignment is required, and if a parol assignment is good in equity it is good under the statute. The assignment may be conditional or for security. Notice to the debtor is not necessary as between the parties to the assignment, but should be given by the assignee if he wishes to protect himself from subsequent assignments by the assignor, or from

payment being made to him by the debtor. (Farley's Appeal, 76 Pa. St. 42.)

The assignee takes subject to equities in favor of the debtor at the time of the assignment. (Spinning v. Sullivan, 48 Mich. 5; Kleeman v. Frisbie, 63 Ill. 482.)*

Sec. 478. SAME SUBJECT—BY OPERATION OF LAW.—Independent of the act of parties rights and liabilities in contract may be transferred from one person to another. Rights arising from contract are transferred by operation of law to others in the case of interests in realty which run with the land, and when by the death or bankruptcy of a party his representatives acquire his rights and liabilities for certain purposes.

Covenants that Run with the Land. Agreements or covenants in a lease which "touch and concern the thing demised," as to repair, pass to the assignee of the lessee whether expressed to have been made with the lessee and "assigns" or not. (Anson on Cont. p. 232; Leppla v. Mackey, 31 Minn. 75.) And by statute the assignee of the reversioner or landlord is entitled to maintain an action on the covenants of the lease. (Baldwin v. Walker, 21 Conn. 168; Smith v. Harrison, 42 O. St. 184.)

At Common Law covenants entered into with the owner of land, and for his benefit, if not merely personal, and concerning the land, pass to his assignees; while covenants entered into by the owner of land

*The rules regarding the transfer of rights under contract which are negotiable will be treated under the subject "Negotiable Instruments" in a subsequent number of this series.

which restrict his enjoyment of the land do not bind his assignees unless an easement is created. (Keppel v. Bailey, 2 Mylne & Keen, 517; Cole v. Hughes, 54 N. Y. 444.) The reason of the rule is the impolicy of allowing land to be trammeled in its transfer by contracts of previous owners. (National Bank v. Segur, 39 N. J. L. 184.)

The common law rule just stated that covenants limiting the enjoyment do not pass to assignees is changed by the courts of equity, which enforce restrictive covenants made between parties to a deed though the land has been assigned. (Stines v. Dorman, 25 Ohio St. 460; Anson on Cont. p. 234-5.)

The Death or Bankruptcy of a Party. The death of a party passes to his personal representative all his personal estate, and all rights in action affecting it, and all liabilities chargeable upon it. Covenants affecting freehold pass to the heir or devisee of the realty. (Anson on Cont. 235.) The exception to this rule is that contracts of personal service expire with either of the parties to them, and performance of contracts which depend upon personal skill, or service cannot be demanded of the personal representative. Nor can a breach of a contract which involves a purely personal loss, as a breach of promise to marry, give a right of action to the executors. (Chamberlain v. Williamson, 2 M. & S. 408; Grubb, Admr. v. Sull, 32 Grat. 203.)

The assignee of a bankrupt is appointed for the purpose of collecting the assets and settling the liabilities of the estate. The same principles which apply to personal representatives apply largely to him.

CHAPTER IV.

THE INTERPRETATION OF CONTRACT.

Sec. 479. WHAT IS MEANT BY THE INTERPRETATION OF CONTRACT.—By the interpretation of contract is meant the method of determining its validity, scope and effect when before the court. Definite rules have been established by the courts for proving the terms, for permitting extrinsic evidence when the contract is written, and for construing the meaning of terms used, and these are the rules which demand our attention in the present chapter.

Sec. 480. INTERPRETATION A MATTER OF LAW.—The interpretation or construction of a contract is for the court, that is, is a matter of law. Where the dispute is as to what was said in an oral contract it is a question of fact for the jury to determine. But when the agreement between the parties is proved it is for the court to determine its effect, and neither party can avoid the plain meaning of his words by claiming he did not intend what he said. So where the parties have written out their agreement in full, by a rule of evidence they are precluded from adding to or varying such written agreement by oral or parol evidence. This general rule of evidence applying to written contracts is subject to certain exceptions, or the rule when interpreted admits certain extrinsic evidence, and this admissible evidence Anson classifies under three heads:

"1. Proof of existence of document. Evidence as to the fact that there is a document purporting to be a contract, or part of a contract.

"2. Of fact of agreement. Evidence that the professed contract is in truth what it professes to be. It may lack some element necessary to the formation of contract, or be subject to some parol condition upon which its existence as a contract depends.

"3. Of terms of contract. Evidence as to the terms of a contract. These may require illustration which necessitates some extrinsic evidence; or they may be ambiguous and then may in like manner be explained; or they may comprise, unexpressed, a usage the nature and effect of which have to be proved.

"We are thus obliged to consider (1) evidence as to the existence of a document, (2) evidence that the document is a contract, (3) evidence as to its terms." (Anson on Contract, pp. 238-9.)

Sec. 481. (1) PROOF OF THE DOCUMENT.—If the contract is under seal it is proved by calling one of the attesting witnesses, and if dead or incapable or out of the jurisdiction, by proving the handwriting of the witness. (Richards v. Skiff, 8 O. St. 586; Elliott v. Dycke, 78 Ala. 150.) If the contract is not under seal, that is, a simple contract, it is necessary to identify the party sued as the one making the contract by parol evidence. So, if the writing is only a part of the contract, or consists of several documents unconnected (except where the statute of frauds requires a connected memorandum), or the written instrument is lost, oral evidence is admissible, to complete the contract, or con-

nect the writings, or prove the contents of the lost document. (Anson on Cont. p. 241; Myers v. Munson, 65 Ia. 423; Blake v. Coleman, 22 Wis. 396.)

Sec. 482. (2) EVIDENCE AS TO FACT OF AGREEMENT.—A written contract may be shown invalid by parol evidence of the incapacity of a party, want of genuine consent, illegality or immortality of object, and the like. (Wooden v. Shotwell, 23 N. J. L. 465; Totten v. United States, 92 U. S. 105.) So it may be shown that no consideration passed for the promise; and that a contract formally executed never received the assent of the parties, or that their assent depended on a contingency which has not happened. (Anderson v. Walter, 34 Mich. 113.) That is, evidence is admissible not to vary a written contract but to show that there never had been a contract at all, as the writing does not conclusively establish the existence of the contract. (Burnes v. Scott, 117 U. S. 582; Leddy v. Barney, 139 Mass. 394.)

Sec. 483. (3) EVIDENCE AS TO TERMS OF THE CONTRACT.—The general rule of law is that the written statement of a contract forms the best evidence of the intention of the parties, and is not to be enlarged or varied by parol evidence. Exceptions to this rule mentioned by Anson are: (a) Terms supplemental or collateral to so much of the agreement as is in writing; (b) cases requiring explanation of the terms of the contract; (c) in introducing a custom or usage into the contract; (d) in applying equitable remedies in a case of mistake. (Anson on Cont. 244.)

Sec. 484. SAME SUBJECT—EXCEPTIONS NOTICED.—(a) Where all the terms have not been put in the writing, parole evidence of the supplemental terms is admissible as completing the contract. (Lyon v. Lenon, 106 Ind. 567; Mobile, etc. v. Jurey, 111 U. S. 584.) An example of a collateral term allowed to be proven by parol is cited by Anson, where a farmer made a lease upon the parol promise by the lessor that the game upon the land should be killed down, and he was allowed damages for the breach of this promise, though it was not mentioned in the lease. (Anson on Cont. 245.) Such collateral agreements will be admitted if it be not contrary to the written agreement. (Walker v. France, 113 Pa. St. 203; Keen v. Beckman, 66 Ia. 672.)

(b) The explanation of the terms of a written contract may be necessary to identify parties, as to show the position which a contracting party occupies, as an agent, partner, and the like. (Leach v. Dodson, 64 Tex. 185.) Or to identify the subject-matter of the contract. (Barrett v. Murphy, 14 Mass. 133; Thompson v. Stewart, 60 Ia. 223.) Or to show the application of a phrase, where a vessel is warranted as "seaworthy," a house promised to be kept in "tenantable" repair, and the like, parol evidence is admissible to show what the parties intended by these phrases. (Anson on Cont. p. 246.)

(c) A written contract may be explained by parol evidence of a local custom or usage, though a term is thereby added, or a different meaning given to one of its terms. (Lowe v. Lehman, 15 Ohio St. 179; Brown

Chemical Co. v. Atkinson, 91 N. C. 389; Swift Iron & Steel Co. v. Drury, 37 O. St. 242.)*

The custom or usage to be admissible must not be at variance with the express terms of the contract, or repugnant to statutory law. (Mansfield v. Inhabitants, 15 Gray, 159.) Or against public policy, or unreasonable or oppressive. (Raisin v. Clark, 41 Md. 158; Penna. Coal Co. v. Sanderson, 94 Pa. St. 302.) And words of manifest and clear import should not be given an unnatural meaning. (Lawson on Usages & Customs, p. 434; Hedden v. Roberts, 134 Mass. 138.)

(d) Where an offer has been made through a mistake, or a written agreement is made and through mutual mistake a term of the contract is contrary to the intention of the parties, it may be shown by parol evidence that the real agreement of the parties was different. (Webster v. Cecil, 30 Beav. 62.) The equity courts will rectify a mutual mistake in a deed or writing, and make the document conform to the true intention of the parties, and for this purpose oral evidence is admissible. (Fowler v. Fowler, 4 D. & J. 250.) If the mis-

*These usages are annexed to the agreement on the "presumption that in such transactions the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages." (Hutton v. Warren, I. M. & W. 466; Soutier v. Kellerman, 18 Mo. 509.)

Lowe v. Lehman, 15 Ohio St. 179. In this case it was held parol evidence of a local custom to estimate the number of brick by measurement of the walls, upon a uniform rule based on the average size of brick, was admissible under a written contract to lay the brick by the thousand. (Contra, Sweeney v. Thomason, 9 Lea (Tenn.) 359.)

take is not mutual, oral evidence will be admitted only in cases having an element of fraud in them, as where the mistake was caused by the party in whose favor it operated, and was known to him before the contract changed his position. (Anson on Cont. p. 250.)

Sec. 485. RULES OF CONSTRUCTION.—The contract being proved as to the terms and stipulations of the parties, and the written agreement having been explained as we have just described, the court follows certain rules of construction in interpreting such contract. These are:

(1) Intention of the Parties. The intention of the parties is to be ascertained from the words used, and when ascertained governs. The words cannot be forced to mean what the parties ignorantly intended them to mean; "horses" could not be read "oxen" by the court, until it was made certain by extrinsic evidence that it was so intended. (2 Pars. Cont. 495.) The words are to be understood in their plain and literal meaning, but in case of error, or mutual mistake, the contract may be rectified, which is to be distinguished from construction. This rule is modified, however, by another, that a valid legal construction is preferred to one invalid, and a construction that will make the contract mean something to one which will render it senseless.

(2) General Rules. Every contract is to be construed with reference to its object and all of its terms; and likewise the situation of the parties at the time of contracting, and the purpose and intention of making the

contract are to be considered in determining the intention of the parties.

The terms used are to be construed according to their plain, ordinary and popular sense, except, of course, technical words, which, when employed, are supposed to be used with regard to their technical sense, and to be always used in the same sense. But the contract is to be supported rather than defeated. Again, all instruments are construed "contra proferentum," or most strongly against him who gives or undertakes, or enters into an obligation; the reason of this rule being that a person is supposed to regard his own interests first, and having promised and chosen his own words, he should be held to all they may import as against him who accepts. (2 Pars. Cont. 507.) General words will be limited by more specific and particular descriptions of the subject-matter to which they refer. Exceptions and conditions in a contract will control only so far as they extend, as the conditions are not favored.

At Common Law the time within which a contract was to be performed was of the essence of the contract in all cases, but in equity this was not so, and unless the contract was meant to depend upon being fulfilled at a day certain it might be performed within a reasonable time. The equitable rule is also the legal rule to-day, and in the absence of an express agreement to that effect, time will not be regarded as of the essence of the contract. (Maltby v. Austin, 65 Wis. 527.) And in some States equity may disregard a stipulation declaring time of the essence of the contract, if it would

be unconscionable to allow it. (Cole v. Wells, 49 Mich. 453; Ballard v. Cheney, 19 Neb. 58; Austin v. Wacks, 30 Minn. 335.)

CHAPTER V.

THE DISCHARGE OF CONTRACT.

Sec. 486. HOW THE DISCHARGE OF A CONTRACT MAY BE EFFECTED.—The modes in which a contract can be discharged are thus stated by Anson:

1. Agreement.—It may be discharged by the same process which created it, mutual agreement.

2. Performance.—It may be performed; and all the duties undertaken by either party may be thereby fulfilled, and all the rights satisfied.

3. Breach.—It may be broken; upon this a new obligation connects the parties, a right of action possessed by the one against the other.

4. Impossibility.—It may become impossible by reason of certain circumstances which are held to exonerate the parties from their respective obligations.

5. Operation of Law.—It may be discharged by the operation of rules of law upon certain sets of circumstances. (Anson on Cont. p. 257.)

These respective methods of discharging a contract will be considered in the present chapter.

Sec. 487. (1) DISCHARGE BY AGREEMENT.—The contract which is created by the agreement of

the parties may be discharged in the same way. And the agreement of the parties which effects its discharge may be in the form of a waiver or rescission, a substituted agreement, or result from the happening of a specified event which was to discharge the contract, called a condition subsequent. (Anson on Cont. 248.)

Sec. 488. SAME SUBJECT—WAIVER.—When the parties to a contract agree that it shall no longer be binding upon them, the contract is waived, cancelled or rescinded. But in discharging a contract in this way, it is to be observed that a consideration must appear for the agreement to waive. In executory contracts the release of each party is the consideration for the promise of each to waive. (Kelly v. Bliss, 54 Wis. 187.) And the agreement to waive a claim arising from contract, after it had fully accrued, nothing remaining to be done by the party waiving, would be void for lack of consideration. (Moore v. Detroit Locomotive Works, 14 Mich. 266.) This rule is said by the weight of authority to apply to promissory notes, and a waiver of rights under them cannot be made by parol without consideration. (Seymour v. Menham, 17 Johns. 169; Byers v. Ryington, 34 Ia. 205.)*

*In Foster v. Dawber, 6 Exch. 839, it was held "that it is competent for both parties to an executory contract, by mutual agreement, without any satisfaction, to discharge the obligation of that contract. But an executed contract cannot be discharged except by a release under seal, or by performance of the obligation, * * * but a promissory note or a bill of exchange appears to stand on a different footing to simple contracts, * * and may be discharged by express waiver." But this is not the American rule. Where a bill or note is surrendered with the intent and for the purpose of dis-

Sec. 489. SAME SUBJECT—SUBSTITUTED AGREEMENT.—Where the parties by agreement substitute a new party for one of those contracting, or so alter the terms of the contract as to make it different from and inconsistent with the original contract, the contract is said to be discharged by substituting another agreement in its place. (Church v. Florence Iron Wks., 45 N. J. L. 129.) If the agreement thus discharged is one required to be in writing by the Statute of Frauds, the new agreement should also be in writing. (Browne on Stat. of Frauds, 411.) When a party is substituted for another, a new contract results though the terms remain the same. (Boyd v. Bertrand, 7 Ark. 321.) The substitution may be by express agreement between the parties, or arise by implication from conduct indicating that the substitution is satisfactory. (Hart v. Alexander, 2 M. & W. 484; Luddington v. Bell, 77 N. Y. 141.)

Sec. 490. SAME SUBJECT—CONDITION SUBSEQUENT.—The parties may have agreed in their contract that the failure to fulfill a specified term, or the happening of a stated event, should discharge the contract, or they may have agreed that one of the parties should have the right to determine it upon notice to the other.

The discharge of a contract by the occurrence of a specified condition or event, is illustrated by the case

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charging the debt, and without fraud or mistake, it operates as a discharge of the debt, and without consideration if the transaction is fully executed. (Albert v. Zeigler, 29 Pa. St. 50; Larkin v. Hardenbrook, 90 N. Y. 334.)

of a bond, the liability upon it being terminated upon the happening of the condition expressed. In contracts of personal service it is quite customary to stipulate for the determination of the contract by a reasonable notice being given, and in England these stipulations have grown into presumptions of fact, but not in this country. (Miller v. Goddard, 34 Me. 102; The Saxonia Co. v. Cook, 7 Col. 572.)

Sec. 491. SAME SUBJECT—FORM OF DISCHARGE BY AGREEMENT.—"The general rule is, that a contract must be discharged in the same form as that in which it is made. A contract under seal can only be discharged by agreement; if that agreement is also under seal, a contract entered into by parol may be discharged by parol." (Anson on Cont. p. 268.)

This rule, as stated by Anson, is qualified by American cases, and a contract under seal may be modified or rescinded by an executed parol contract. (Cook v. Murphy, 70 Ill. 96; Green v. Wells, 2 Cal. 584; Allen v. Jacquish, 21 Wend. 632.) The parties having acted upon the parol of agreement and altered their situation it would be an injustice not to give it effect. (Robinson v. Bullock, 66 Ala. 554.) So it is held that the contract under seal may be discharged by a parol contract, after there has been a breach. (McMurphy v. Garland, 47 N. H. 323.)

A parol or simple contract may be discharged by word of mouth or in writing, regardless of the fact that the contract discharged is in writing. The only exception to this is that already noticed in regard to the discharge of a contract which the Statute of Frauds re-

quires to be in writing, such a contract, if discharged by a new agreement, requires the new agreement to be in writing. (Ante, Sec. 489; Musselman v. Stoner, 31 Pa. St. 265; Hill v. Blake, 97 N. Y. 216.)*

Sec. 492. (2) DISCHARGE BY PERFORMANCE.—When a contract has been fully performed according to its terms on both sides it is discharged. But the performance by one party of his promise, unless it is a promise given for an executed consideration, does not necessarily discharge the contract, though it may do so.

Payment is a common mode of discharging a contract by performance. The contract may contemplate the payment of a sum certain at a specified time, and payment of this sum is a performance of the contract. But the payment may result in performance by being substituted for some other act, or by being accepted in satisfaction of a breach of the contract.** When a negotiable instrument is given in payment of a contract claim, if the parties expressly agree that it shall be a discharge of the existing liabilities, the note alone can be sued on. Otherwise the note is but a conditional

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*But it is held that a substituted performance agreed upon by parol, fully executed by the vendor, and accepted by the vendee, may be set up in defense at law in a suit on a written contract within the statute of frauds. Long v. Hartwell, 34 N. J. L. 116.

**"Payment, then, is the performance of a contract, whether it be a performance of an original, or of a substituted contract, or of a contract in which payment is the consideration for a forbearance to exercise a right of action which may have arisen from the breach of an agreement." (Anson on Cont. p. 272.)

discharge, and failure to pay it revives the previous liability.*

A mere tender, whether of payment or of performance of an act, may discharge the person tendering from further obligation under the contract.** Where the performance due is the payment of a sum of money, tender does not discharge the debt, and the debtor must remain ready and willing to pay, and if sued must pay the money into court, and such tender if full and sufficient will protect him from liability for costs.***

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*Emerine v. O'Brien, 36 Ohio St. 491; Walsh v. Lennon, 98 Ill. 27; McGuire v. Bidwell, 64 Tex. 43. A distinction is made between notes given for precedent debts, and those given for contemporaneous debts. Where the note of a third person is given for a debt contracted at the time, the inference is that the note is in payment of the indebtedness, but this is not the case if the debt is a precedent one, or the note of the debtor is given for a present debt. (Ford v. Mitchell, 15 Wis. 308; Whitbeck v. Van Ness, 11 Johns. 409.) If the debtor indorses the note of the third party it operates as a conditional payment. (Shriver v. Keller, 27 Pa. St. 61.)

**Simmons v. Green, 35 Ohio St. 104; Cleveland v. Sterrett, 70 Pa. St. 204. Thus if the vendor of an article does all he agreed in regard to delivery of the article, and the purchaser fails to accept the article, the vendor is discharged by such tender, and may sue for the breach, or successfully defend if sued.

***See State statutes for requisites of tender. (Rev. Stat. Ohio, Secs. 5137-8.) Art. I., Sec. 10, U. S. Const. prohibits the States from making anything but gold and silver coin a tender in payment of debts. As a rule the party tendering a money payment should not only have the money about him, and in such denominations that the amount due may be paid without having to give change, but should produce it, unless this is waived by the absolute refusal of the creditor to receive it. (Aulger v. Clay, 109 Ill. 487; Elderkin v. Fellows, 60 Wis.

Sec. 493. (3) DISCHARGE BY BREACH.—A party who fails to perform his promises under a contract thereby commits a breach of the contract, and such breach in every instance gives the other party a right of action either to secure damages for the breach or to enforce the party in default to specifically perform his promise. Further, such breach by a party may discharge the other party from the performance of what he has promised in the contract. It is to be observed that while every breach gives a right of action to the opposite party, it may not be sufficient to discharge such party from his duty of performance. So it is necessary to inquire in what case a breach will amount to a discharge. (Anson on Cont. 276.)

Sec. 494. SAME SUBJECT—AS INDICATED BY THE METHOD OF THE BREACH.—A breach of contract may occur: (a) By a party renouncing his liabilities under it, (b) by a party so acting as to make it impossible to fulfill his promise, (c) or by the party totally or partially failing to perform what he has promised. (Anson on Cont. 281.)

(a) A party may renounce his liability under a contract before performance is due, or in the course of performance. If he renounces it in toto before performance is due, the other party may treat the contract as discharged, and sue at once for a breach.* So, if the party during performance refuses to perform his

339.) This subject will be considered more fully in connection with the subject of "Personal Property" in a later number of this series.

*Hochster v. Delatour, 2 E. & B. 678; Crabtree v. Messersmith, 19 Ia. 182; James v. Adams, 16 W. Va. 267. The ex-

part, the other party is discharged from further performance and may bring an immediate action for the breach.*

(b) The action of the party which makes it impossible for him to fulfill his promise may also be before or during performance. In either case, if one of the parties by some positive act makes it impossible that he should perform his promise, it is such a breach of the contract as will discharge the other party, who may sue at once for the breach, and if the impossibility occurs when the contract is part performed, the plaintiff may sue also on a quantum meruit for the part done.**

(c) A partial or total failure of a party to perform what he has promised without an open expression of intention to abandon his rights under the contract, may, or may not, discharge the other party. In the cases just considered the party in default by breach, has, by renunciation, or acts making it impossible for him to perform, made performance by the other party unnecessary; the breach causing a discharge of the contract as regards the party injured, nothing remains but the right of action for the breach. But where the breach results from a failure of performance by one

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pression of intention not to perform should amount to an absolute refusal, and be treated as such by the opposite party. (Dingley v. Oler, 117 U. S. 503.)

if the party during performance refuses to perform his

*Anson on Cont., p. 284; Hosmer v. Wilson, 7 Mich. 304; Collins v. Delaporte, 115 Mass. 162.

**Wolf v. Marsh, 54 Cal. 288; Boyle v. Guysinger, 12 Ind. 273; Hawley v. Keeler, 53 N. Y. 114; Rankin v. Darnell, 11 B. Monr. 30; Lovell v. Mut. Life Ins. Co., 111 U. S. 264.

party, the other may yet have to perform his promise under the contract, though having a right of action for the breach by the other. If the promises of the parties are independent of one another, then a breach by one party failing to perform does not discharge the other from his promise; but if the promises are conditional upon one another, the failure to perform by one will discharge the other. Hence we shall have to consider promises which are independent, and those which are conditional.

Sec. 495. SAME SUBJECT—INDEPENDENT PROMISES.—A promise may be independent in several ways: (i) It may be absolute, (ii)it may be divisible, (iii) it may be subsidiary. (Anson on Cont. p. 287.)

(i) By an absolute promise is meant one for which the consideration is the mere liability of the other party, and not the performance of his promise.* The order in which things are to be done serves to test whether the promises are absolute or not.** And the modern tendency is to favor that construction which

*Anson gives as an illustration of absolute promises a case in which one party agreed to raise 500 soldiers and take them to a port, and the other to provide transportation and victuals to transport them to Galicia; the party failed to provide the ships and victuals at the time appointed, and when sued for the breach set up as a defense that the plaintiff had not raised the soldiers. The defense was held bad on demurrer, as the promises were distinct covenants, and to be performed independent of one another. Either having an action against the other for non-performance. (Anson on Cont. p. 288; Ware v. Chappell, Style, 186; Dey v. Fox, 9 Wend. 129.)

**Mattock v. Kinglake, 10 A. & E. 50; McCoy v. Bixbee, 6 Ohio, 312; Street Ry. Co. v. Butler, 50 Cal. 574.

will render the promises dependent rather than absolute.*

(ii) Where the performance of a promise is divisible a partial breach is no discharge. A common example in which the promise of each party is thus divisible in its performance is the sale of goods by a contract under which the delivery and acceptance are to take place by installments. The decisions are conflicting in regard to installment contracts being divisible or not.** The default in one installment may show intent to break the contract, as where it is accompanied with a statement to that effect, or where the non-payment of one installment indicates the inability of the buyer to pay for the rest. So the parties may agree that there shall be a full performance of a divisible contract before the other promise is binding.***

*Hamilton v. Thrall, 7 Nebr. 218; Scheland v. Erpelding, 6 Or. 258.

**In Simpson v. Crippin, L. R. 8 Q. B. 14, where a quantity of coal was sold to be delivered in equal monthly installments for a year, and one party was to send wagons to get the coal, and failed to send wagons sufficient to receive the first installment, it was held that this did not authorize the other party to rescind the contract. (Scott v. Killaning Coal Co., 89 Pa. St. 231; Cohen v. Platt, 69 N. Y. 348.

In Norrington v. Wright, 115 U. S. 203, it was held that the failure to ship a monthly installment of iron rails as agreed did authorize the other party to rescind the contract and refuse to receive the remaining installments. The monthly shipment was considered as a condition precedent, the failure of which authorized the repudiation of the whole contract. This case is directly contra to Simpson v. Crippin, as are Hill v. Blake, 97 N. Y. 221; Robson v. Bohn, 27 Minn. 233, and numerous others.

***Anson on Cont., p. 292; Cutter v. Powell, 6 T. R. 320.

(iii) "Where a promise is to be performed in the course of the performance of the contract and after some of the consideration, of which it forms a part, has been given, it will be regarded as subsidiary, and its breach will not effect a discharge unless there be words expressing that it is a condition precedent, or unless the performance of the thing promised be plainly essential to the contract."* So a warranty of quality in an executed contract of sale is an example of a subsidiary promise, for a breach of which damages are recoverable, but the contract stands.

Sec. 496. SAME SUBJECT—CONDITIONAL PROMISES.—Conditional promises are, as regards time of performance, either subsequent, concurrent, or precedent. The effect of a condition subsequent has already been considered. (Ante, Sec. 490.) The rights

*Anson on Cont. p. 294; Bettini v. Gye, 1 Q. B. D. 183. In this case, Bettini, a singer, agreed to be in London at least six days before the commencement of his engagement, for the purpose of rehearsals. The promise was broken by his arriving only two days ahead, and the manager of the opera, to whom Bettini had engaged himself as a singer upon terms of which the above was one, elected to treat the contract discharged. But the court held that this term was not expressly made vital to the contract, and since from a survey of the whole contract the failure of the term did not change the contract, it did not go to the root of the matter so as to authorize the defendant to rescind.

A contract which is entire and indivisible, as a contract to work for "six months certain" at a stated price per month, gives the party stipulating no right to recover for a part performance. (Larkin v. Buck, 11 Ohio St. 561; Grant v. Johnson, 5 N. Y. 247.) But this rule is being modified by later decisions. (Wilson v. Wagar, 26 Mich. 464; Wolf v. Gerr, 43 Ia. 339; Benjamin on Sales, 4th Am. Ed. Vol 12 p. 902.)

of the one to the promise of the other is terminable upon the happening of the specified event.

A condition is concurrent when the rights of the one party are dependent upon his doing, or being prepared to do, something at the same time that the other party performs his promise. Thus, payment and delivery, in a contract of sale in which nothing is said as to the time of payment, are concurrent conditions; and neither party can enforce performance by the other without standing ready and willing to perform his part.*

And like concurrent conditions are the mutual promises of the parties, which are each the entire consideration for the other. Where the mutual promises are the whole consideration on both sides, neither can sue the other without averring that he has performed, or is ready to perform, his promise.**

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* "Where goods are sold, and nothing is said as to the time of delivery or the time of payment, and everything the seller has to do with them is complete, the property vests in the buyer, so as to subject him to the risk of any accident which may happen to the goods, and the seller is liable to deliver them whenever they are demanded upon payment of the price; but the buyer has no right to have possession of the goods till he pays the price." (Baylay, J., in Bloxam v. Sanders, 4 B. & C. 941; Elevator Co. v. Bank, 23 Ohio St. 311; Brunswick & Balke Co. v. Martin, 20 Mo. App. 158; Simmons v. Green, 35 O. St. 104.)

**Anson on Cont., p. 299; Boone v. Eyre, 1 H. Bl. 273n. But the rules stated in this section are, in the case of sales, executory or executed, modified to this extent; that goods which do not answer the description of the article sold, or are not marketable and worthless, the buyer is not bound to accept them, and if he has done so and paid the price, he may rescind the contract and recover it back. (Cosgrove v. Bennett, 32 Minn, 341; Marston v. Knight, 29 Me. 341; Bronson v.

A condition precedent is defined to be, "a statement or promise, the untruth or non-performance of which discharges the contract." (Anson on Cont. p. 303.) In the case of a promise which is a condition precedent the rights of the one to the promise of the other does not attach until something has been done, or has happened, which the parties treated as essential to the contract.*

But if the parties do not treat a statement or promise as essential it fails to become such a condition as will discharge the contract and is treated as a warranty, and only gives rise to an action for damages.**

Sec. 497. SAME SUBJECT—REMEDIES FOR BREACH.—When the contract is discharged by a breach, the injured party has the three distinct rights:

Turner, 77 Mo. 489; Rogers v. Hanson, 35 Ia. 283; Byers v. Chapin, 28 Ohio St. 306.) Some cases hold that the right to rescind an executed contract of sale for breach of warranty is confined to cases where the warranty is fraudulent. (Hoover v. Sidener, 98 Ind. 290; Wright v. Davenport, 44 Tex. 164.)

*That a breach of a condition precedent discharges a contract, see Roger v. Sheerer, 77 Me. 323; Bell v. Hoffman, 92 N. C. 273. But the performance may be waived, or rendered impossible by act of God, the law or the other party, and then it does not discharge. (Dermott v. Jones, 2 Wall. 1.)

**Anson on Cont. p. 304. And the same author thus defines a warranty, "Warranty is a more or less unqualified promise of indemnity against a failure in the performance of a term in the contract. * * * The breach of a term which amounts to a warranty will give a right of action, though it will not take away existing liabilities; it is a mere promise to indemnity." But the courts do not use the terms "condition" and "warranty" with the same precision as Anson, and frequently use the terms as synonymous. (Norrington v. Wright, 115 U. S. 203; Benjamin on Sales, 4th Am. ed., Sec. 965.)

(a) To be exonerated from further performance, (b) to sue upon a quantum meruit, if he has done anything under the contract, this being considered a new cause of action based upon the conduct of the parties; (c) to sue for the breach of the contract. (Anson on Cont. p. 308.) And, further, whether the contract be discharged or not by the breach, the injured party may maintain an action for damages for the loss suffered, and in certain cases may, by an action for specific performance, compel the defaulting party to carry out the terms of the contract.

Damages. The general rule for determining the amount of damages recoverable is, that the amount shall be the equivalent of, or a compensation for, the loss or injury sustained.* If no loss has occurred the plaintiff is entitled to "nominal damages," by which is meant "a sum of money that may be spoken of, but that has no existence in point of quantity," as, for example, "six cents."**

Remote or consequential damages, by which is meant such as arise indirectly from the breach of an agreement, cannot be recovered. The rule being that the plaintiff may recover the actual and direct loss sustained by him, and for such consequential injuries as are the natural and fair results of the defendant's violation of his contract.*** Another statement of this rule

*Noble v. Ames Mfg. Co., 112 Mass. 497; Buckley v. Buckley, 12 Nev. 439; Griffin v. Colver, 16 N. Y. 494.

**Beaumont v. Greathead, 2 C. B. 494.

***Manahan v. Smith, 19 O. St. 384; Daniels v. Ballantine, 23 O. S. 532. Where the plaintiff agreed to do a piece of work at a stated price, and defendant refused to let the work

is that the plaintiff is entitled to such damages as might have been supposed by the parties to be the natural result of a breach of the contract; or such as might have been in their contemplation when the contract was made.*

An exception to the general rule that damages are recoverable only as compensation and not by way of punishment, is made in the case of the breach of promise of marriage, where the injury to the feelings of the plaintiff are considered as specific pecuniary loss.**

Specific Performance. Specific performance is an equitable remedy which compels a party to carry out his agreement as promised; if the promise is to forbear, then the corresponding remedy is by an injunction to compel forbearance. As a rule these remedies canot be resorted to where: (a) The common law remedy of damages is adequate to the loss sustained; (b) or the matter of the contract is such that the courts cannot supervise its execution.***

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be done in breach of the contract, the damages were held to be the profits arising from the doing of the work. ((Doolittle v. McCullough, 12 O. St. 360.) Profits contingent upon future bargains, or other contracts, or speculations, are not in general recoverable. (U. S. v. Behan, 110 U. S. 338; Sterling Organ Co. v. House, 25 W. Va. 64; Goodrich v. Hubbard, 51 Mich. 62.)

*Anson on Cont., p. 310; Hadley v. Baxendale, 9 Exch. 355; Shouse v. Neiswanger, 18 Mo. App. 245; Fleming v. Beck, 48 Pa. St. 312; Buffalo Barb Wire Co. v. Phillips, 64 Wis. 338.

**Johnson v. Travis, 33 Minn. 231; Thorn v. Knapp, 42 N. Y. 474; Sedgwick on Damages, 437.

***Anson on Cont., p. 312; Lumley v. Wagner, 1 D. M. & G. 604. In this case the court refused to specifically enforce a

Sec. 498. SAME SUBJECT—DISCHARGE OF RIGHT OF ACTION ARISING FROM BREACH.—The right of action arising from the breach of a contract may be discharged in either of three ways: (a) By consent of parties; (b) by the judgment of a court of cempetent jurisdiction; (c) by lapse of time. (Anson on Cont. p. 314.)

(a) The person entitled may consent to release or waive the right of action, and this release if made upon consideration discharges the right. (Ante, Sec. 488.) Or the parties may, by an accord and satisfaction, discharge the right of action.*

(b) The judgment of a court having jurisdiction of the right of action in the plaintiff's favor discharges or merges the right of action into a contract of record. If the judgment is adverse to the plaintiff he is estopped from bringing another suit on the same cause, but on appeal a higher court may reverse such judgment. A judgment adverse to the plaintiff in order to discharge the action by estoppel, must have been a final judgment rendered upon the merits of the case.**

(c) Aside from the statutes of limitations lapse of

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contract to sing in the plaintiff's theater, but restrained the defendant from singing elsewhere (Port Clinton R. Co. v. Cleveland R. Co., 13 O. St. 544-550; Marble Co. v. Ripley, 10 Wall. 358.)

*Pettis v. Ray, 344; Hemmingway v. Stansell, 10 U. S. 399; Simmons v. Hamilton, 56 Cal. 493.

**Atkins v. Anderson, 63 Ia. 739; Gage v. Ewing, 114 Ill. 315; Knapp v. Eldridge, 33 Kans. 106; Maxwell v. Clark, 139 Mass. 112.

time does not affect the rights of parties to contracts.* The statutes withdraw the remedies after the lapse of the specified time, but do not extinguish the rights. Hence remedies barred by the statute of limitations may be revived in certain ways, as by acknowledgment or by part payment.**

Sec. 499. (4) DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE.—As a general rule a subsequent impossibility of performance will not excuse a party who has made an unconditional promise to do a thing.*** But a group of excepstions to the rule

*Each State regulates the time within which actions must be brought by statutes, called "Statutes of Limitations." They are founded on older English statutes, but are not uniform in their provisions. The English statute of 21 James I. c. 16, required actions on simple contract to be brought within six years, and on specialties within twenty years. See Wood on Lim. of Actions; Rev. Stat. Ohio, Secs. 4974-4992.

**An acknowledgment to revive a debt barred by the statute of limitations must be made with the formalities required by the statute; must amount to a promise to pay the debt, and be made by and to the proper person. (Riddel v. Brizzolara, 64 Cal. 354; Parker v. Shuford, 76 N. C. 219; Wood on Lim. of Actions, 128.) Part payment to revive a barred action must amount to an acknowledgement; it must be made on account of the barred debt, and as a part payment of a greater debt. (Benton v. Holland, 58 Vt. 533; Miner v. Lorman, 56 Mich. 212.)

*** "If the promisor make the performance of his promise conditional upon its continued possibility, the promisee takes the risk. * * If the promisor makes his promise unconditionally, he takes the risk of being himself liable, even though performance should become impossible by circumstances beyond his control." (Anson on Cont. 321-2; Paradine v. Jane, Aleyn, 26; Harrison v. Mo. Pac. R. Co., 74 Mo. 371; The Harriman, 9 Wall. 172; Jones v. U. S., 96 U. S. 29; School Dist. No. 1 v. Dauchy, 25 Conn. 530.)

have been established by judicial precedents. Thus, if the impossibility arises from a change in the law of the country, the promisor will be exonerated.* Or. if the continued existence of a specific thing is essential to the performance of the contract, its destruction, without fault of either party, discharges the contract. ** And if the object of the contract is the rendering of personal services, it will be discharged by impossibility arising from the death or illness of the promisor.***

Sec. 500 (5) DISCHARGE OF CONTRACT BY OPERATION OF LAW.—The operation of rules of law in certain cases discharge a contract; thus, the bankruptcy of a party when legally determined by a competent court discharges previous debts and liabilities, so the contract may be merged into a higher obligation as a judgment or deed, and by spoliation or alteration of a deed or written contract it may be discharged.

To effect a merger of a simple contract, the security given in its stead should be of a higher efficiency; the

*People v. Ins. Co., 91 N. Y. 174; Semmes v. Ins. Co., 13 Wall. 158; Miss. etc., R. Co. v. Green, 9 Heisk (Tenn.) 588.

**Taylor v. Caldwell, 3 B. & S. 826; Dexter v. Norton, 47 N. Y. 65; Powell v. R. Co., 12 Oreg. 489; Wells v. Calnan, 107 Mass. 514.

***Green v. Gilbert, 21 Wis. 401; Fenton v. Clark, 11 Vt. 557; Harrington v. Fall River Iron Works Co., 119 Mass. 82; Spalding v. Rosa, 71 N. Y. 40. The prevalence of a fatal disease in the vicinity where work was to be performed was held to discharge a laborer from his contract for service in Lakeman v. Pollard, 43 Me. 463. Though in Dewey v. School Dist., 43 Mich. 480, the closing of a school on account of smallpox was held not to discharge a contract with the teacher.

subject matter of both securities should be identical, and the parties the same.*

In general, the alteration or spoliation of a deed or instrument in writing, which will effect its discharge, must be made by a party to the contract, or while in his possession and for his benefit,** without the consent of the other party, and such alteration must be material, that is, cause the instrument altered to have a different legal effect.***

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*Anson on Cont. p. 326; Martin v. Hamlin, 18 Mich. 364; Hutchins v. Hebbard, 34 N. Y. 24; Doty v. Martin, 32 Mich. 462.

**Martin v. Tradesmen's Ins. Co., 101 N. Y. 504; Wilmington v. Kitchen, 91 N. C. 39; Peirsol v. Grimes, 30 Ind. 129. Material alteration made by a stranger will not avoid the instrument. (Fullerton v. Sturges, 6 Ohio St. 529.) And see Nickerson v. Swift, 135 Mass. 518; Sullivan v. Rudisill, 63 Ia. 158.

***Greenl. Ev. 5; Fuller v. Green, 64 Wis. 159.

PRINCIPLES OF THE LAW OF PARTNERSHIPS.

CHAPTER I.

OF THE FORMATION OF PARTNERSHIP.

Sec. 501. INTRODUCTORY.—Partnerships are of ancient origin, and the law of partnerships is a compound of the Roman Civil Law, the Law-Merchant, and the Common Law. Under the Roman law partnership was founded upon confidence, and was independent of contract. The partners, usually united by a tie of blood, were mutual trustees in the business, and shared the profits in proportion to the contribution each made to the common fund. During the middle ages, when trade was carried on under great difficulties, partnership assumed its modern form. It was recognized as a contractual relation, but the necessity of trade confining partners to members of the same family, perpetuated the Roman principle of its being a confidential relation and negatived the doctrine of consideration, which had become the controlling element in contractual relations. Partnership became a function of trade; by the Law-Merchant a partner had the power to buy, sell, or make any contract in the course of trade; the Common law, which recognized

joint ownership, but did not permit the joint owner to sell or mortgage his co-tenant's share, found it necessary to incorporate the rules of the Law-Merchant, and thus we have the special rules applicable to joint owners who are partners.*

Sec. 502. AUTHORITIES.—Of the English writers on Partnership we mention Archbold, Collyer, Lindley, and Pollock. American writers on the subject are Theophilus Parsons, Story, Bates, James Parsons and Mechem. Ewell and Wentworth are American editors of Lindley's work.

The student is also referred to the statutes of his State, as many principles regulating partnerships are now fixed by local statutes. This is especially true of Limited partnerships, and partnership associations. In England the law of partnership has been codified, and this has been done in several of the American States.**

Sec. 503. MANNER OF TREATING THE SUBJECT.—The subject of Partnership can be best treated under the three parts, into which it naturally divides itself: 1. The formation of partnership, or the assuming the relations of partners. 2. The principles which regulate partnership during its existence. 3. The principles by which the business is wound up.*** Accordingly we shall in the present chapter treat of the formation of partnership; in the second, of the princi-

*See Secs. 1, 2, 3, 5, J. Parson's Prin. of Part.

**See Louisiana Code, Secs. 2801-2890; Code of Calif., Secs. 2401-2520; also Codes of Montana and Dakota.

***This is the division followed by J. Parsons in his treatise.

ples regulating partnership; and, in the third, of the dissolution of partnership.

Sec. 504. PARTNERSHIP DEFINED.—"Partnership is a legal relation, based upon the express or implied contract of two or more competent persons to unite their property, labor or skill in carrying on some lawful business as principals for their joint profit. The persons so united are called 'partners.' The term 'co-partnership' is sometimes used to designate the relation, and the term 'co-partners' to designate the parties. The partners collectively are called the firm."*

There is difficulty in defining a partnership, as the term has a double significance. 1. It is a contract relation subsisting between persons who have united their property, labor or skill in an enterprise or business as principals for the purpose of joint profit. 2. It is also the organization as an entity, or the thing created and existing by reason of such persons entering into the relation described.

Sec. 505. HOW PARTNERSHIP IS CREATED. —To create a partnership two things must concur:

*Mechem, Elements of Partnership, Sec. 1.

"Partnership is the relation which subsists between persons carrying on a business in common with a view to profit." (Eng. Part. Act. of 1890.)

"A partnership is the contract relation subsisting between persons who have combined their property, labor or skill in an enterprise or business as principals for the purpose of joint profit."—Bates on Partnership.

"Partnership is the association of two or more persons for the purpose of carrying on business together and dividing its profits between them." (Sec. 2395 Cal. Code.)

1. There must be a valid agreement to enter into it.
2. The agreement must be executed, or acted upon.

Sec. 506. SAME SUBJECT—THE VALID AGREEMENT.—By a valid agreement is meant that the partnership contract, or the articles of agreement between the partners must have the ordinary essentials of a binding legal contract, and that the partnership should have a legal object.

The partnership agreement may be express or implied. The parties may expressly agree orally or in writing to become partners, upon certain stipulated conditions, or the existence of the partnership may be implied or inferred from transactions between the parties, as the law presumes that the parties intend the legal consequences of their voluntary acts. (Duryea v. Whitcomb, 31 Vt. 393.)

The contract or agreement between the parties to a partnership agreement must be mutual and voluntary. No person can be introduced into a partnership without the consent of all the partners, but this consent may be expressly given or implied from their acquiescence in permitting the new party to assume the position and duties of a partner.

A partnership contract, like other contracts, is vitiated and avoided by fraud, deception, coercion, and the like. It must have competent parties, and be upon consideration.* It may be oral or in writing, but in

*The mutual agreements to become partners, and the contribution of the parties usually form the consideration. The contributions need not be equal. (Mechem on Part., Sec. 33.)

cases where the statute of frauds requires contracts to be in writing, the statute must be followed.

Sec. 507. SAME SUBJECT—THE AGREEMENT MUST BE EXECUTED.—The mere executory agreement to form a partnership does not invest the parties with the character of partners, or constitute the partnership. There must be something done to carry out the agreement and consummate, or launch, the partnership. The agreement must be executed. Until the agreement has been acted upon the partnership has not come into being, and a breach of the agreement gives only a right of action for damages or a suit in equity for specific performance of the agreement.*

Sec. 508. WHEN THE PARTNERSHIP BEGINS.—Where the partnership agreement is express, and a date is set in the articles for the commencement of the partnership, it is presumed to have commenced on that date in the absence of other evidence. Where the partnership is implied from acts, it will be presumed to have commenced when those acts transpired. It is the intention of the parties, expressly stated, or implied from their actions, which governs. The written agreement may be varied to conform with the facts, and, if such is the intention, the partnership may come into being before the articles of agreement are formulated.**

*Reed v. Meagher, 14 Colo. 335; Buzard v. McAnulty, 77 Tex. 438; s. c. 14 S. W. Rep. 138.

**Guice v. Thornton, 76 Ala. 466; Cook v. Carpenter, 34 Vt. 121; s. c. 80 Am. Dec. 670.

The question whether or not a partnership exists in a given case, may be a question of law or fact. When the facts upon which the partnership is based are in dispute, it is a question of fact for the jury; if the facts are admitted it is a question of law for the court. (Morgan v. Farrell, 58 Conn. 413; Boston Smelting Co. v. Smith, 13 R. I. 27.)

The burden of proving the existence of partnership, and identifying the partners, rests upon the party setting up the fact of partnership. (Dunham v. Loverock, 158 Pa. St. 197.) As between the partners themselves the fact of partnership may be shown by the articles, the conduct or admission of the parties, the books of the firm, or other writing, showing who were the partners. Third persons may show who were the partners and establish the partnership by parol evidence of the admissions of the parties sought to be charged. (Reed v. Cremer, 111 Pa. St. 482.) The existence of a partnership cannot be proved or the partners identified by general reputation or hearsay. (Bowen v. Rutherford, 60 Ill. 41.) And the admissions of one party to charge another must be shown to have been authorized or acquiesced in by the party to be bound. (Wanderhurst v. De Witt, 95 Cal. 57.)

Sec. 509. WHO MAY BECOME PARTNERS.—Any number of competent persons, more than one, may enter into a partnership. Persons who are competent to transact ordinary business on their own account are competent to become members of a partnership. Under this rule, infants, alien enemies, persons

mentally unsound, and those under guardianship are incompetent to become partners. The contracts of infants being voidable and not void permits an infant to become a partner, but he may at any time before maturity set up his infancy against personal liability as a partner. As a partner the infant has all the rights and powers of a member of the firm; his interest in the partnership is liable for the firm debts, and his contribution may not be recovered from the firm unless he has been induced to enter the firm through fraud. (Adams v. Beall, 67 Md. 53.) At majority the infant partner may ratify his partnership transactions and bind himself for obligations incurred during his minority.

Corporations cannot become partners unless their charter gives them express authority to do so. (Butler v. Am. Toy Co., 46 Conn. 136.) But a partnership as a partnership may enter into another firm, or enter into a partnership with an individual. (Raymond v. Putnam, 44 N. H. 160.)

The personal representative of the estate of a deceased person cannot make the estate a partner. And the purchaser of a partner's interest cannot become a member of the firm without the consent of the other partners. This is because the relation is one of confidence, and requires the utmost good faith between the partners. Hence as a general rule of partnership great respect is paid to the choice of persons (Delectus Personae) by which partners, whose relations are founded on mutual trust and confidence, may protect themselves from having irresponsible and untrustworthy

persons introduced into the firm. (Love v. Payne, 73 Ind. 80.)

Sec. 510. KINDS OF PARTNERS.—In respect to their relation to the partnership, partners are variously designated as: Ostensible, Secret, Nominal, Silent, Dormant, Retiring, Incoming, General and Special partners.

An Ostensible partner is one who is publicly held out to the world as a partner, as by being joined in the name, sign, letter heads, and the like. A Secret partner is one who keeps himself concealed from the public, and from all customers of the partners. He profits by his secrecy only while it continues.

A Nominal partner is one who, though not a partner in fact, is held forth as a partner with his own consent so as to make him liable as a partner, on the ground that he has given credit to the firm, and authorized transactions on his responsibility.

A Silent partner is one who takes no active part whatever in the business of the firm, and exercises none of the rights of a partner except that of receiving his share of the profits. Such a partner is the opposite of the active partners or those who participate in the firm undertaking. A partner who does not participate in the business is a silent partner, whether he is known or not as a partner.

A Dormant partner is one who is both unknown and secret to the public and wholly inactive concerning the affairs of the firm.

A General partner is one who, as a member of a lim-

ited partnership, transacts the business of the firm; whose name is used in the firm name, and who is liable to the full amount for the debts and obligations of the firm. A Special partner is one who contributes a special amount of capital to a limited partnership, and who, by complying with the provisions of the law under which the limited partnership exists, is not liable for debts of the firm beyond the amount which he contributes.

A person who leaves an existing firm is called a Retiring partner; and one who enters such a firm is called an Incoming partner.

Sec. 511. KINDS OF PARTNERSHIP.—Partnerships are either: Universal, General, Special, or Limited.

A Universal partnership is one in which all the property owned by the parties is contributed, and all the profits are joint benefits.* A General partnership is one in which the partners have united for the general purpose of conducting some kind of a business as it is usually carried on. A Special partnership is one created for the conduct of a single adventure or enterprise.

A Limited partnership is one in which one or more of the partners are partners in the ordinary and general way in respect of authority, property and liability, and where one or more have placed a certain sum in the business and have no liability beyond the loss of

*Universal partnerships are not common, but may exist. (Rice v. Barnard, 20 Vt. 479; U. S. Bank v. Binney, 5 Mason—U. S. Cir. Ct.—183; Gray v. Palmer, 9 Cal. 616.)

the sum so contributed. At the Civil law this was the normal type of partnership, but now limited partnerships exist by virtue of State statutes.*

In addition to the partnerships just mentioned, the statutes of many States provide for Joint-stock companies, which are partnerships with transferable shares; and Partnership associations limited, which are crude forms of corporations.** The various unincorporated social clubs, societies, lodges, granges, Christian and co-operative associations, not organized for profit, are not partnerships, and their members cannot be held liable as partners. But the members of such associations who authorize acts to be done by other members may be held liable under the rules applicable to principal and agent.***

Sec. 512. PURPOSES OF PARTNERSHIP.—There is no lawful business that may not be the subject of a partnership. But a personal office, as a public office of any kind, is not to be made the subject of a partnership. There may be a partnership for carrying on every sort of a trade, manufacture, or profession.****

*See J. Parsons on Part., Sec. 26.

**Mechem on Partnership, Sec. 7; Rev. Stat. Ohio, Secs. 3161a-3161m.

***Lafond v. Deems, 81 N. Y. 507; Burt v. Lathrop, 52 Mich. 106.

**** "The transformation of trade from its starting point in the exchange of commodities to its triumph in the commercial and industrial state has made partnerships co-extensive with business." (J. Parsons, Part., Sec. 7.) There may be a partnership in manufacturing, which is not a trade, but an industry, and in fact neither buying nor selling need be an element in the business. (Holmes v. N. Ins. Co., 2 Johns. Cas. 329.)

At Common law land was not a natural subject of commerce, but now a partnership may exist for dealing in land, or for improving land.*

A mining partnership forms a distinct species. In it there is no "delectus personae," and the holder of a share in the stock is invested with membership even against the will of his co-partners. And neither the death of a partner nor the assignment of his share dissolve the firm. (Jones v. Clark, 42 Cal. 180; Taylor v. Catle, 42 Cal. 367.)

Where the purpose of the partnership is unlawful or opposed to public policy, as for the operation of a gambling establishment, the speculation in "futures," or to prevent competition, or to carry on any occupation which is forbidden, or in violation of the law, it is void.** The effect of the illegal object is to prevent any action being brought to enforce the partnership contracts, but third persons innocent of wrongdoing may sue the members of such a partnership. The members or partners themselves will be left where they have placed themselves.***

Sec. 513. TESTS OF A PARTNERSHIP.—The question whether or not the relation existing between

*Yeoman v. Lasley, 40 O. St. 190; Blacks App., 8 Norris (Pa.) 201. But farming on shares does not constitute a partnership, but only the relation of landlord and tenant. (Brown v. Jaquette, 13 Nor. 113.) The parties may agree to be partners in farming. See J. Parsons, Part., Secs. 7-12.

**Mechem on Part., Sec. 18; Gaston v. Drake, 14 Nev. 175; Davis v. Gelhaus, 44 O. St. 69.

***Anderson v. Powell, 44 Ia. 20; Hunter v. Pfeiffer, 108 Ind. 197; Craft v. McConoughy, 79 Ill. 346.

the parties constitutes a partnership is sometimes difficult to answer. If the parties expressly intended to become partners, their intention usually governs. But unless their contract and the relation assumed constitutes a partnership, the mere fact that they intended a partnership or called it so, will not answer. (Sailors v. Nixon-Jones Co., 20 Ill. App. 509.)

Where the parties allege that they did not intend to become partners the question is more complicated. While the general rule is stated to be that there can be no partnership between the parties if thy did not intend one, and none as to third persons if there was none as between the alleged partners themselves; this rule is subject to the exceptions or explanations: 1. That the legal effect of an agreement will prevail against the intention of the parties, and make them liable as partners as between themselves; and, 2, a person, though not a partner, may so conduct himself toward third persons as to reasonably induce them to rely upon him as a partner, and then he is estopped from denying his liability as a partner. This is said to be a partnership as to third persons, or a quasi-partnership, to distinguish it from the case in which there is a true partnership between the parties. See Mechem on Part., Secs. 38-40.

Sec. 514. SAME SUBJECT—WHEN THE PARTNERSHIP IS IMPLIED.—Though the parties deny that they intended to create a partnership, they are nevertheless bound as partners if the legal effect of their acts and contracts constitutes a partner-

ship. The expression of their intention is not so powerful as the legal effect given to their words and conduct; and their real intention is determined by ascertaining whether or not the relation which they have assumed possesses the incidents of a partnership or of some other relation.* The word partnership need not necessarily be used by the parties, as their intention is determined from the effect of the entire contract, regardless of special expressions.

Thus where the agreement between the parties bears all the insignia of a partnership, as where they have united their capital or labor in an enterprise, managed and owned jointly, each having the rights of a proprietor as to the conduct of the business and the sharing of profits or losses, the agreement constitutes a partnership as a matter of law. But the mere sharing of profits does not necessarily create a partnership, as one party may receive them as agent, servant or creditor and not as a co-proprietor.** There must be at

*Moore v. Davis, 11 Ch. D. 261; Beecher v. Bush, 45 Mich. 188; Post v. Kimberly, 9 Johns. 504.

The law simply imposes upon the parties an adherence to the positions which they have taken, not in semblance but in fact, and charges them as principals where the facts make them so. The attribute which distinguishes a partner from all who are not partners is the undertaking of a business and being a co-proprietor of it. If the business is not carried on by the partner it is at least for him, and the power which could and can terminate the relation perpetuates it by permitting it to stand. So an advance, coupled with partnership privileges, makes a lender a partner. (J. Parsons on Part., Sec. 50.)

** "The distinction between taking profit as profit, and taking it not as profit, but as the payment of a debt, is a familiar one, firmly established by the authorities, but not always ex-

least these elements of a partnership: A community of interest in some lawful business, for the conduct of which the partners are mutually principals of, and agents for, each other, with general powers within the scope of the business; though the powers may be restricted so as to make one the sole agent of the others.*

Sharing both profits and losses does not make part-

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plained as clearly as it might be. The one is taking it as a principal, as of his business; the other is taking in the capacity of a hired man or other creditor." (Eastman v. Clark, 53 N. H. 297—Doe. C. J.)

As the extension of the word "sharing" would make everybody a partner who partook of the profits, the law was preserved by denying the effect of a partnership unless the sharing was in the capacity of a principal or co-proprietor. (J. Parsons, Part., Sec. 59; Hargrave v. Conroy, 4 C. E. Greene, N. J., 281; Lamb v. Grover, 47 Barb. 317.) So sharing profits as part of salary does not make the person so receiving profits a partner. (Vanderburg v. Hull, 20 Wend. 70.) And the principle of hiring extends to any employment in which the employe is subject to the control and direction of the principal. (Mair v. Glennie, 4 M. & S. 240.) So an attorney who takes half the profits with the client for his fees is not a partner, but a professional employe. (Prouty v. Swift, 51 N. Y. 594, 1873.) An agent of the proprietor, whatever his dignity, is but an employe, and not a principal as long as he does not act on his own behalf in conducting the business. The moment he acts for himself or as a principal he becomes or is liable as a proprietor. (Will v. Simmons, 8 Hun. 189.)

*Beecher v. Bush, 45 Mich. 188; Berthold v. Goldsmith, 24 How. 541; Flower v. Barnekoff, 20 Ore. 137; Clifton v. Howard, 89 Mo. 192; Spaulding v. Stubbins, 86 Wis. 255.

"Partners being nothing but co-proprietors in business, proving the indicia of ownership, charges a principal who would not otherwise be identified as a partner." (J. Parsons, Part., Sec. 54.)

ners of the recipients who do not take as proprietors.* So, sharing gross profits or returns does not make a recipient a partner. (Heimstreet v. Howland, 5 Denio, 68.) Receiving a commission on sales, or in lieu of salary, or as interest on loans by one not a principal, does not make him a partner with the proprietor.** Sharing manufactured articles in proportion to the raw material furnished does not constitute the parties partners.*** And in general the inference will be against a partnership where the facts are consistent with any other relation, as the courts are unwilling to impose the unlimited liability of partners if any other relation will cover the facts.****

Sec. 515. SAME SUBJECT—PARTNERSHIPS AS TO THIRD PERSONS.—As we have seen in a previous partnership there may be partnership liability by a person who has induced others to regard him as a partner, though there is no partnership in fact. These were called quasi-partnerships, or partnerships as to third persons. Formerly there were two main grounds

*J. Parsons, Part., Sec. 61, but see Lindley, Part., 19.

**Sodiker v. Applegate, 24 W. Va. 411; McDonald v. Battle House Co., 67 Ala. 90; Harvey v. Childs, 28 O. St. 319; Culley v. Edwards, 44 Ark. 423; Hanna v. Flint, 14 Cal. 73.

***Butterfield v. Lathrop, 21 Smith (Pa.) 225, where parties furnishing milk to a cheese factory and sharing the product were not partners.

****Parsons, J., on Part., Sec. 67. Thus co-owners of a vessel who divide earnings are not partners; nor are co-owners of a house, or theater, or a patent, partners; or connecting lines of railways which divide the net receipts in proportion to the length of their lines, or workmen who build an article in common and divide the receipts. See Mechem on Part., Sec. 53, and cases cited.

of holding a person liable as a partner to third persons; these were, sharing profits, and holding oneself out as a partner.* The first ground, that of sharing profits, has been overthrown in England, and many of the States, but still prevails to some extent. The taking of profits was held to make one liable as a partner to third persons, because taking profits reduces the fund which the creditors must look to for the payment of their claims, and because the losses are a counterpart of sharing profits. But later cases repudiate this theory that the taking of profits constitutes the persons a partner, and limit the creation of a quasi-partnership to instances where the person has been held out as a partner.**

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*Mechem on Part., Secs. 55-68.

**The main authorities for the rule that sharing profits made a person a partner as to third persons are Grace v. Smith, 2 Wm. Bl. 998, and Waugh v. Carver, 2 H. Bl. 235 (1793). These authorities have been followed in America, and in a few States have not been overruled. Leggett v. Hyde, 58 N. Y. 272; Wessels v. Weiss, 166 Pa. St. 490; Southern Fertilizer Co. v. Reams, 105 N. C. 304.)

The case of Cox v. Hickman, 8 H. L. Cas. 268 (1860), overruled the earlier cases of Grace v. Smith and Waugh v. Carver, and this case has generally been followed in the United States. (Harvey v. Childs, 28 O. St. 319; Clifton v. Howard, 89 Mo. 192; Beecher v. Bush, 45 Mich. 188.) In the latter case, Cooley, J., stated the test of a partnership to be substantially as has been laid down in Sec. 514, and said that unless such an agreement existed between the partners, or a person has allowed the public or individual dealers to be deceived by the appearances of partnership where none exists, he is never to be charged as a partner. See Wagoner v. First National Bank, 43 Nebr. 84; Parchen v. Anderson, 5 Mont. 438, s. c. 51 Am. Rep. 65.)

Holding Out. A person may make himself liable as a partner by holding himself out as one. Such holding out may occur in three ways: 1. By the direct act or declaration of the partner. 2. He may be held out as an actual member by the partners with his consent. 3. Or he may be held out by the other partners with his knowledge and without his prohibition. In each of these cases his liability is the same, toward all persons who deal with the firm on the credit of his name.* No particular form or ceremony is necessary to constitute a holding out, and the party may be made liable whether he has consented to the holding out or been merely negligent in preventing his name being presented to third persons under such circumstances as reasonably induces them to rely upon him as a partner. The holding out must be known to the party deceived by it, and if he knew that the party held out as a partner was not so in fact, he is not deceived and cannot complain.** The holding out cannot be established by proof of public notoriety unless the fact is known to the party sought to be charged. (Gaffney v. Hoyt, 10 Pac. Rep. 34.) The facts of the holding out are for the

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*Parsons, J., Part., Sec. 69. See Rizer v. James, 26 Kan. 221.

**Morgan v. Farrel, 58 Conn. 413; Fletcher v. Pullen, 70 Md. 205. In the last case it is said: "The law on this subject, well established by authority, may be stated thus: The ground of liability of a person as partner who is not so in fact is that he has held himself out to the world as such, or has permitted others to do so, and by reason thereof is estopped from denying that he is one as against those who have in good faith dealt with the firm or with him as a member of it."

jury to determine. (Burgan v. Colson, 1 Pennypacker, Pa. 320.)

The person who has permitted himself to be held out as a partner is made liable as one to third persons, but does not, therefore, acquire the rights or obligations or a partner as between himself and his alleged copartners. (Mechem, Part., Sec. 73.) The partner by "holding out" may be sued with the other partners in a joint action by the creditors who have been deceived. By putting himself in a position to incur liability he becomes a partner as to third persons, and may be sued as such. (J. Parsons, Part., Sec. 70.)

Sec. 516. SUB-PARTNERSHIPS.—"One or more of the partners of a firm, less than the whole number, may unite with a third to form a partnership as to the interest of such partner or partners. Such a partnership is frequently called a sub-partnership, and the person so associating with the partner is often called a sub-partner." (Mechem, Part., Sec. 30.) This means simply that a partnership is created between the partner and the person with whom he shares his interest. The sub-partner does not become a member of the original firm, or obtain the right to participate in its management, but may prevent the diversion of the funds. He is liable as a co-partner to creditors of the firm, as he is a co-proprietor of firm stock and interested in the profits and losses of the business.*

*J. Parsons, Part., Sec. 68; contra, Mechem on Part., Sec. 30; Burnett v. Snyder, 81 N. Y. 550. See Nirdlinger v. Bernheimer, 133 N. Y. 45; Fitch v. Harrington, 13 Gray, 468.

Sec. 517. PARTNERSHIP MAY RESULT FROM ATTEMPTED INCORPORATION.—The authorities are not in harmony as to the effect of a defectively organized corporation upon the status of the parties. Some holding them liable as partners in every case in which the corporation fails, and others denying that they are partners if a corporation was intended. Professor Mechem states the true test of determining their status to be, whether or not a corporation was possible to the parties. If it was not, as in the absence of legislative authority, then the parties are liable as partners; but if incorporation was possible and was honestly attempted, then the parties are not partners, as they may be regarded as having formed a corporation "de facto."*

*Mechem on Part., Sec. 10, 11. But see Parsons, J., Part. Sec. 24; Rianhard v. Hovey, 13 Ohio, 300. A continuation of a corporation after the charter expires does not bind the stockholders as partners. (Bank v. Walker, 66 N. Y. 425.) The assuming a franchise creates a de facto corporation which exists until a decree of ouster. (Society Perun v. Cleveland, 43 O. St. 481.) There must be a substantial compliance with the formalities to constitute a de facto corporation. (Kaiser v. Lawrence Savings Bk., 56 Ia. 104; Mokelumne Hill Mining Co. v. Woodbury, 14 Cal. 424; Finnegan v. Noerenberg, 52 Minn. 239.)

CHAPTER II.

PRINCIPLES REGULATING PARTNERSHIP DURING EXISTENCE

Sec. 518. THE CAPITAL OF THE FIRM.—Having treated of the formation of partnership we come now to consider the incidents and principles which regulate the partnership during its existence. And first of the partnership capital, which is the aggregate sum of the amounts agreed to be paid or contributed by each partner as the basis for the beginning or continuing the business of the firm. Capital need not be money, but may be furnished in the form of any kind of property. The capital, or contribution of each partner, in whatever shape contributed, is partnership and not individual property for the duration of the partnership.* A partner cannot commit a crime by any act relating to the possession of the partnership property, as by embezzlement, and the like. His con-

*Conflicting theories prevail in regard to the contribution of the partners to the firm capital. By the English theory the contribution becomes the property of the firm out and out as other property, but the tendency is to treat it as an advance to be repaid before profits. Another theory is that the contribution is a loan by the partner to his firm, and is charged as a debt to be repaid before any division of firm assets can be made. (Whitcomb v. Converse, 119 Mass. 38; Taft v. Schwamb, 80 Ill. 289; J. Parsons on Part., Sec. 31.)

trol of the firm property is lawful, and the only remedy for its misuse is in equity. But by agreement the parties may limit the authority of a partner over firm property. The amount or proportion which each partner contributes to the firm capital is important, as it is repaid before profits upon termination of the partnership, and may be the basis upon which the profits and losses are shared.*

The enhancement in value of a contribution during the existence of the partnership enures to the firm, which is also chargeable with any depreciation. (Frelinghausen v. Ballantine, 38 N. J. Eq. 266.) Under the debt theory the assets are distributed on account of and in proportion to the contributions, and each partner must make up a loss in proportion to his share of the profits. (Moley v. Brine, 120 Mass. 324.)

Sec. 519. REAL ESTATE AS FIRM PROPERTY.—A partnership being composed of several persons cannot hold land in the firm name, and a conveyance to the firm operates to vest the legal title in the individual partners whose names are in the firm name. The individual partners hold the title as tenants in common, but in equity the land is treated as partner-

*Hasbrouck v. Childs, 3 Bosw., N. Y., 105; Everly v. Dubarrow, 8 Phila., R. 93. "The title to the contribution, though involved in the use by the firm, is, as between the partners, separate estate. Upon this theory the partners share the capital stock according to their contributions as they share the profits." (J. Parsons, Part., Sec. 33; Munro v. Whitman, 8 Hun. 553.)

ship property and as though the title was held by the firm as an organization.*

If purchased as partnership property and used for that purpose it will be considered partnership property, no matter how it is held. (Robinson Bank v. Miller, 153 Ill. 244, s. c. 38 N. E. Rep. 1078; Page v. Thomas, 43 Ohio St. 38.) But the fact that property has been purchased with firm money is not sufficient or conclusive of the intention of the partners to make real estate thus purchased partnership property. The intention of the partners is the chief criterion in determining the question of partnership property in realty, and is to be ascertained, in the absence of an express intention, from the ownership of the funds, which purchase the land, the use to which it it put, and the manner in which it is entered on the firm books. (Lindsay v. Race, 103 Mich. 28, 1894.)

Sec. 520. SAME SUBJECT—ITS SALE BY A PARTNER.—As a general rule where land belongs to the firm while the title is in one or more of the partners, a purchaser from the partners without notice of the partnership rights acquires a good title. (Erwins App. 3 Wr. (Pa.) 535; Page v. Thomas, 43 O. St. 38.) And if a partner has authority to act for the firm his sale of the real estate will bind the firm. (Rovelsky v. Brown, 92 Ala. 522.) The firm real estate in the name of a deceased partner goes to the heir in trust for the

*Winter v. Stock, 29 Cal. 407; Menage v. Burke, 43 Minn. 312; Mechem, Part., Secs. 84, 104; Riddle v. Whitehill, 135 U. S. 621.

settlement of the partnership debts. (Martin v. Morris, 62 Wis. 418.) And equity will compel the conveyance of the legal title to the surviving partner for the settlement of the firm business. (Buckley v. Buckley, 11 Barb. 43.)

Sec. 521. SAME SUBJECT—WHEN CONSIDERED PERSONALTY.—The general rule in the United States is that where real estate forms any part of the partnership property it is to be treated as such, though the firm consider it as personalty. But in equity it will be treated as personal property to meet the debts of the partnership and wind up the business, and after that as realty.*

Sec. 522. TITLE TO FIRM PROPERTY GENERALLY.—The partners are co-owners of the firm property, and co-proprietors. And this joint ownership and joint control limits to some extent the individual rights of the partners. It is said that the prerogatives of the several owners interlock, and each partner obtains a qualified dominion over the purparts of the others.** Hence a partner has no particular interest in any specific chattel or property belonging or contributed to the firm, his only interest is in a proper portion of the surplus after the affairs of the firm have been settled. The partners by contributing create the

*Woodward-Holmes Co. v. Nudd, 58 Minn. 236; Rovelsky v. Brown, 92 Ala. 522; Paige v. Paige, 71 Ia. 318; Fairchild v. Fairchild, 64 N. Y. 471. In England the rule is otherwise and realty belonging to the partnership is given the character of personalty.

**J. Parsons, Part., Sec. 97.

firm estate, each losing a part of his exclusive dominion over his contribution and his co-partners acquiring in it new rights of ownership, and becoming co-proprietors over the integral stock.*

As a result of the partnership estate being recognized as a modified form of joint tenancy it is held: 1. If a separate execution issues it covers only the debtor's interest in the firm. And there must be an accounting to determine his interest. (Staats v. Britton, 73 N. Y. 264; Gerard v. Bates, 124 Ill. 250.)

2. Upon the death of a partner, the surviving partner alone can wind up the business, and the personal representative's rights are simply to compel him to do so. (Jacquin v. Buisson, 11 How. Pr. 385.)

3. If a partner sell his interest to his co-partner, accounts standing against him on the books are extinguished, as they are not debts but items of the general account. The partner cannot assign, sell or mortgage any portion of the firm property as his own share, but may transfer his interest in the whole business, and

* "Joint tenancy represents the transition from the family or tribal title of primitive law to the individual title of modern times. The Partnership title is an adaptation of joint tenancy to commercial purposes, abridging some of its incidents and enlarging others. The rights of creditors depend upon the joint estate of the partners. * The partner becoming a debtor as well as an individual as a partner. * * * Partnership is a status. * By status is meant in general the sum of the rights and duties of an individual in a given political and social relation. * * Partnership being a status based upon firm estate, does not derive all of its distinguishing features from the contract of the parties. If there is no firm property the joint creditors share the partner's separate estate with his separate creditors." (J. Parsons, Part., Secs. 98-102.)

such sale works a dissolution of the partnership, and upon settling the business the interest of the assignee is determined. (Collins' App., 107 Pa. St. 590.) By statute or agreement the sale of shares in mining partnerships and joint stock companies does not work a dissolution.*

4. In the absence of agreement the profits are divided equally, no matter how the property was contributed. Losses are to be borne in the same proportion. (Rouch v. Perry, 16 Ill. 37; Farr v. Johnson, 25 Ill. 522; Lindley on Part. (Ewell's Am. Ed.) 349.) But this rule does not apply to the division of the capital, which as we have seen (Sec. 518*) is treated as a debt to be repaid before dividends.

Sec. 523. SAME SUBJECT—PARTNER'S EXEMPTION.—As a general rule the members of a firm are not entitled to statutory exemptions out of their share of firm property, as an exemption is an individual and not a firm privilege.**

*The assignee or mortgagee of the interest of a partner takes subject to all debts and liabilities, for he can acquire no greater interest than his assignor or mortgagor had. Nor can a partner give to his individual creditor a specific lien upon the partnership property, or any part of it. If the title of the firm in any piece of firm property is conveyed as a partnership act, it will supersede anything that an individual partner may have attempted to with it.

**Gaylord v. Imhoff, 26 O. St. 317. And a homestead erected on firm land is not exempt from execution. (Trowbridge v. Cross, 117 Ill. 109.) But in some States the statutes or constitution provide for an exemption of a homestead out of partnership property. (Harris v. Vischer, 57 Ga. 229; Skinner v. Shannon, 44 Mich. 86.)

Sec. 524. THE FIRM NAME AS PROPERTY. —The firm name is used for two purposes, for convenience and for identification. When used it represents the firm just as if each individual name was used, and parol evidence may be used to show who are members. The name may, in the absence of restrictive statutes, be anything the members think proper, and may be changed at pleasure without any effect whatever upon the organization, as it is a mere matter of identification. (Bank v. Monteath, 1 Denio, 402; Barcroft v. Haworth, 29 Ia. 462.) A firm name becomes of value as property through its connection with a firm as a means of identification. And its use will be protected to the firm, unless it is the name of an individual or individuals who desire to use the name in their business and without design to deceive the public as to their identity. (Williams v. Ferrand, 88 Mich. 473; Bininger v. Clark, 60 Barb. 113.) Upon dissolution of the firm the retiring partner may agree to the continuation of the firm name by the other partner, and limit his own right to go in business in his own name. (Frazer v. Frazer Lubricator Co., 121 Ill. 147.) Where the firm name is a fictitious one, that is, does not contain the name of the individual partners, either partner, in the absence of agreement, may continue to use it after dissolution, but if the firm name contains the names of the partners it cannot be used after dissolution so as to deceive the public as to the change in the firm. (Holbrook v. Nesbitt, 163 Mass. 120; Hookham v. Pottage, L. R. 8 Ch. App. 91.) And the name if of value may

be treated as an asset, and disposed of as such. (Fenn v. Bolles, 7 Abb. Pr. (N. Y.) 421.)

Sec. 525. THE GOOD-WILL OF THE FIRM AS PROPERTY.—By the good-will is here meant the favor and patronage which the firm has won by fair dealing from the public, and the probability that it will continue. (Cruttrell v. Lye, 17 es. 335.) This good-will, like the firm name, has a value that entitles it to be classified as firm property. As a rule it belongs to the business and not to the place, except in the case of hotels, theaters and the like. (Booth v. Jarrett, 52 How. Pr. 169; Chittenden v. Witbeck, 50 Mich. 401.) It does not pass with a sale of the stock, but does pass with a sale of the business. (Hoxie v. Chaney, 143 Mass. 492.) Upon dissolution it becomes an asset of the firm, to be accounted for as other property. (Sheppard v. Boggs, 9 Nebr. 257; Rammelsberg v. Mitchell, 29 O. St. 22.)

Sec. 526. IMPLIED POWERS OF PARTNERS. —As between themselves parties becoming partners may limit by agreement the powers to be exercised by individual partners, but in the absence of such agreement, or in dealing with third persons who have no notice of the limitations imposed by agreement, each partner impliedly possesses certain usual and ordinary powers in dealing with the firm business and property.

Thus, every partner is impliedly the general agent of the firm and transacts the business of the firm in the usual and ordinary way. But as agent for the firm he must bind all or none but himself. He is not the agent

of an individual but of an entity. The authority of a partner to bind the firm in dealing with third persons, is derived in two ways:

1. It may be a real authority derived from the articles of copartnership, or from the nature of the business in the absence of articles.

2. It may be the apparent authority derived from the nature of the business, though actually restricted by the partnership articles.

Sec. 527. SAME SUBJECT—EXTENT OF POWERS.—The implied authority of a partner extends to all acts within the usual and ordinary scope of the business of the firm. The scope of the business includes whatever is necessary for its successful conduct, considering its nature and usage, but subject to enlargement or restriction through the known habits or conduct of the particular firm.* Each occupation has certain characteristics determining, in the absence of notice, what powers a partner may be assumed to possess. The articles seldom define a partner's power, and if they did they are seldom seen, so a party must judge from appearances. (Livingstone v. Roosevelt,

* "One partner has no implied power to bind the firm in any matter outside of the scope of the business as ostensibly carried on. Thus, is is not within the scope of the business of a firm of lumber manufacturers to subscribe for stock in a plank-road company; nor of a firm of millers, or planters and farmers, to carry on a grocery store; nor of an iron furnace partnership to buy a distillery; nor of a printing firm to undertake to sell pianos; nor of a trading partnership to collect accounts for others, to buy land for speculation. (Mechem on Part., Sec. 165; Barnard v. Plank- road Co., 6 Mich 274; Boardman v. Adams, 5 Ia. 224.

4 Johns. 251.) A partner cannot bind his copartners beyond the scope of the mutual adventure. If the partnership is apparently one of limited powers as a non-trading partnership or a professional one, third persons are bound to take notice of this fact in dealing with a partner. (Baxter v. Rollins, 90 Ia. 217; Lee v. Natl. Bank, 45 Kans. 8.)

In determining what is within the scope of a firm business, the usage of others engaged in a similar business is to be considered; so the habits of the particular firm, and the acts, declarations, and general course of business bear directly upon the question of its nature and extent. The question of what is within the scope of the firm business is usually a question of fact to be determined from the circumstances, but a given act may, as a matter of law, be decided to be without the scope.*

Sec. 528. SAME SUBJECT—INSTANCES.—The acts, admissions and declarations of a partner during the existence of a partnership, and while he is engaged in business within the scope of the partnership, is evidence against the firm, but not to prove the existence of the partnership itself, or to deprive other partners of their interests in the firm property. (Natl. Bank. v. Conway, 67 Wis. 210; Williams v. Lewis, 115 Ind. 45.)

Each partner has implied authority to employ the necessary servants and agents to transact the firm business. And when the partnership is appointed the

*Loudon Savings Society v. Sav. Bank, 36 Pa. St. 498; Banner Tobacco Co. v. Jenison, 48 Mich. 459.

agent of a person, the act of a single partner in the due execution of the agency binds the firm; the rule that an agent cannot delegate his authority does not apply to a partnership, as the partners are both agents and principals in transacting firm business. (Frost v. Erath Cattle Co., 81 Tex. 505; Deakin v. Underwood, 37 Minn. 101.)

A partner has no implied authority to bind the firm by a submission to arbitration. (Gay v. Waltman, 89 Pa. St. 453.) Nor to make a general assignment for creditors. (Loeb v. Pierpont, 58 Ia. 469; Hill v. Postley, 90 Va. 200.) And a partner's confession of judgment will not bind his copartners. (J. Parsons Part., Sec. 122.)

Each partner in a trading firm has authority to sign the name of the firm to negotiable paper. In signing negotiable paper the partner represents the firm and not the individuals, and binds them as members of the firm and not otherwise.* So, in a trading firm the partners have each implied power to borrow on the credit of the firm for the firm, and issue firm notes, but in a non-trading firm they do not have this authority. (Walsh v. Lennon, 98 Ill. 27; Levi v. Latham, 15 Neb. 509.) And partners have authority to compromise a

* A partner may make, draw accept or endorse commercial paper for his firm, and his individual name accepting firm paper binds the firm. Tolman v. Hanrahan, 44 Wis. 133; Blodgett v. Weed, 119 Mass. 215; McKee v. Hamilton, 33 O. St. 7. But a partner cannot make accommodation paper in the firm name, either for his own use or the use of a third person, and any one taking such paper with knowledge of its character could not recover. Newman v. Richardson, 9 Fed. Rep. 865.

debt of the firm, release a claim to the firm, and to pay firm debts. But a release of a claim without consideration by a partner is void. (Beatson v. Harris, 60 N. H. 83.)*

A partner has implied power to sell any specific part of the partnership property which is held for the purpose of sale, and this extends to choses in action, and he may warrant the title and quality. (Ellis v. Allen, 80 Ala. 515.) So he may buy goods intended for sale or use within the scope of the firm business. (Stillman v. Harvey, 47 Conn. 27; Johnston v. Trask, 116 N. Y. 136.) As a general rule the partner has no implied power to bind the firm by an instrument under seal, his power being limited to simple contracts. A partnership has no seal, while a corporation has. But the firm may ratify such unauthorized act of a partner or give him special authority. (Russell v. Annable, 109 Mass. 72.) And if the partner has authority to do an act the seal may be treated as surplusage. (Edwards v. Dillon, 147 Ill. 14; J. Parsons Part., Secs. 117-118.)

A partner may sue and defend suits in the firm name, but must indemnify the other partners if he acts without their consent. He may employ counsel and enter the appearance of the firm. For damages accruing for illegal suits brought by a partner the firm is ordinarily liable. (Mechem on Part., Sec. 187; Harvey v. Adams,

*The limit of the partner's authority to borrow is fixed by the amount which is usual in the class of business in which his firm is engaged. His mortgage of property for firm debt is valid. But the guarantee of the debt of a third person by a partner, unless an incident to firm business, binds the individual and not the firm. (Sutton v. Irwin, 12 Sergt. & R. 13 Pa.) See Parsons, J., Part., Ch. 8.

32 Mich. 472.) A partner sued for a firm debt may offset a firm claim without his partner's permission. (J. Parsons, Part., Sec. 128.)

Sec. 529. POWERS OF A MAJORITY.—In managing the internal affairs of a partnership and conducting its business, a majority of the partners have the right to control as against a minority. But the powers of a majority do not extend to authorize them to take up a new kind of a business, or change the nature of the business. (Abbott v. Johnson, 32 N. H. 9; Clarke v. R. Co., 136 Pa. St. 408.)

Sec. 530. RIGHTS AND DUTIES OF PARTNERS.—As between themselves the partners are obligated from the confidential nature of their relation to observe and exercise a high degeree of good faith. Hence a partner can never lawfully prefer his own interest to that of the firm. He cannot directly or indirectly buy from or sell to the firm on his own account without the knowledge and consent of the other partners. Nor can he bind the firm by a secret agreement prejudicial to his copartners made with another firm in which he has an interest; neither is it proper for him to keep the benefits of a firm bargain for himself, and all such benefits secured by him through secret stipulations must be shared with the firm.*

In the absence of agreement a partner cannot give

* Newell v. Cochran, 41 Minn. 374; Caldwell v. Davis, 10 Colo. 481. Taking a renewal of an existing lease in individual name inures to the benefit of the firm. (Mitchell v. Reed, 61 N. Y. 123.) Buying a claim against the partnership at a discount by a partner accrues to firm. (Easton v. Strothers, 57 Ia. 506; Mechem on Part., Sec. 112n.)

his time and attention to carrying on another business or firm to the prejudice of his copartners. And if he secretly carries on the same kind of business in competition with the firm he may be compelled to account for the profits, but not if the business is a different and non-competing one.* The partners must observe the stipulated agreements, and for a breach of these conditions answer to the other partners.** The partners are held to exercise care and skill in the conduct of the business, to keep accounts of the transactions of firm business and have them accessible to the other partners, and to counsel and advise with each other in regard to important partnership affairs.***

It is the right of each partner to share in the management of the business, unless by agreement one or more have been given its management. The books and accounts of the firm are to be accessible to the partners alike. If there is a managing partner he is bound to conduct the business with the greatest good faith toward the other partners. (Brooks v. Martin, 2 Wall. 70.) The partners are not entitled to compensation for services rendered the firm, other than their share of the profits, unless an agreement to that effect is expressly or impliedly agreed to between the partners. (Hannaman v. Karrick, 9 Utah 236; Emerson v. Durand, 64 Wis. 111.)

*Goldsmith v. Eichold, 94 Ala. 116; Latta v. Kilbourn, 150 U. S. 524; Metcalfe v. Bradshaw, 145 Ill. 124.

**Marsh's Appeal, 69 Pa. St. 30; Murphy v. Crafts, 13 La. Ann. 519.

***Yetzer v. Applegate, 83 Ia. 726; Hall v. Clagett, 48 Md. 223; Yorks v. Tozer, 59 Minn. 78.

Each partner has the right to have the firm property applied to firm debts; this is because the obligations of the firm are entire and bind each partner to their full payment. Hence one partner cannot apply partnership property to his own private debts, and, though attempted, it will not give third persons a good title. But he may do so as between the partners if the other partners expressly assent to it, or subsequently ratify his acts. (Davies v. Atkinson, 124 Ill. 474.) Creditors of the firm have indirectly a prior right to have the partnership property applied to the payment of their claims on the dissolution of the firm. And this is said to be based upon the presumption that such is the wish of each partner, and not because the creditors have a lien upon, or an absolute right to, priority of payment out of partnership property. (Mechem on Part., Sec. 124.) The firm debts and obligations are joint debts, and if paid by one partner he may require the other partners to contribute and thus indemnify him. (Lyons v. Murray, 95 Mo. 23; Wheeler v. Arnold, 30 Mich. 304.) But if the partnership is an illegal one, a partner cannot enforce contribution. (Smith v. Ayrault, 71 Mich. 724.)

Sec. 531. LIABILITY OF PARTNERS ON FIRM CONTRACTS.—Partnership contracts at law, as distinguished from equity, are considered joint, and are neither several, nor joint and several.* That is,

* Mechem on Part., Sec. 209: "It is sometimes said that, while partnership contracts are joint at law, they are joint and several in equity; but this seems to be true as respects the remedy only." (Idem.)

the obligation arising from firm contracts affects the partners jointly and makes their liability joint. Hence in suits against a firm all the partners should be joined unless out of the jurisdiction or bankrupt.* And a judgment against one partner on a firm obligation releases the other partners, as it merges the joint liability in the judgment.** So a compromise by a partner with a firm creditor would release the firm. But the statutes may change the joint action into one both joint and several, prevent the merging of the entire claim in a judgment against one or more, and make a composition with one partner affect him only, and not discharge the rest.***

*Smith v. McDonald, 1 South 103; J. Parsons, Part., Sec. 76. A nominal partner may or may not be necessary to the suit. (Idem.)

** "A judgment against one, upon a joint contract of several persons, bars an action against the others, though the latter were dormant partners of the defendant in the original action and the fact was unknown to the plaintiff when that action was commenced. When the contract is joint, and not joint and several, the entire cause of action is merged in the judgment. The joint liability of the parties not sued with those against whom the judgment is recovered being extinguished, their entire liability is gone. They cannot be sued separately, for they have incurred no several obligation; they cannot be sued jointly with the others, because judgment has been already recovered against the latter, who would otherwise be subjected to two suits for the same cause." (Field, J., in Mason v. Eldred, 6 Wall. 231; Curry v. White, 51 Cal. 185).

***The legislatures have intervened and modified the rule as to joint actions against partnerships. And the Codes tend to make the joint action both joint and several. J. Parsons, in his work on Partnerships, objects to the joint action, and urges that the jointness of the contract is nothing but a form, and states that the real substantial contracts are the individual con-

Sec. 532. SAME SUBJECT—EXTENT OF LIABILITY.—Apparently opposed to the principle of the common law that partnership obligations are joint is the further principle that each partner is responsible in solido for all the debts of the firm. The action to establish the liability is joint, as common law process was not remodeled to conform to firm transactions, but the liability itself is several.* Hence each partner in a general partnership is personally and individually liable for the entire firm debt, however arising. And this is so whether the other partners are able to contribute or not, and without regard to the proportion of interest the partners may have in the firm.**

The partner represents his copartners and a judgment against him for a firm obligation entitles the creditors to seize and sell the firm property. (J. Pars., Part., Sec. 95.) And a judgment against the firm may be satisfied out of one or more of the partners' indi-

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tracts of the partners, which in the aggregate constitute the firm contract. (Secs. 81-96. Parsons, Part.) See Rev. Stat. Ohio,; Secs. 3162-6; Stat. of Mich., Sec. 7730. For effect of Pennsylvania statute see J. Parsons, Part., Sec. 83. Sheeby v. Mandeville, 6 Cranch, 243.

* See J. Parsons, Part. Sec. 80-95. "The creditor was put to his election between a joint and several remedy, but he is, on principle, entitled to either or both for the satisfaction of his claim." (Idem, Sec. 91.)

** The liability involves every one who was, at the time of the contract, either actually or nominally a partner in the firm. Nominal partners are liable from being held out and secret or dormant partners are liable when discovered. (Mechem on Part., Secs. 193,214; Farmers' Ins. Co. v. Malone; 45 Neb. 302; Sweet v. Wood, 18 R. I. 386.

vidual property, without regard to the firm property. But this rule may be varied by statute. And a partner who has thus been compelled to pay a firm debt may enforce contribution from his copartners. (Mechem on Part., Secs. 215-216.)

Sec. 533. LIABILITY OF PARTNERS AND THE FIRM FOR TORTS.—A firm becomes liable for torts or wrongs committed by individual partners while acting within the scope of the business, in the same manner as a master is bound for his servant's tort, or a principal for that of his agent. If the tort is not committed while in the transaction of firm business, or within its scope, the mere fact of partnership relation will not render the firm liable. The firm is also liable for all damages resulting from negligent acts of its servants and agents, as are other principals. And for the fraud or misrepresentation of a partner in the transaction of firm business the firm is liable. But for tortious or criminal acts of a partner without the scope of the business, and not ratified or authorized by the firm, and for breaches of trust in regard to funds which have been entrusted to the partner as an individual and which have not come into the possession of the firm in the course of business, the firm is not liable.*

* For cases holding the firm liable, see: Hess v. Lowrey, 122 Ind. 225; Haley v. Case, 142 Mass. 316; Strang v. Bradner, 114 U. S. 555; Stanhope v. Swafford, 80 Ia. 45. When not liable for partners personal acts, not within scope of business, see: Rosekrans v. Barker, 115, 111, 331; Todd v. Jackson, 75 Ind. 272; Englar v. Offut, 70 Md. 78.

Sec. 534. SAME SUBJECT—THE LIABILITY JOINT AND SEVERAL.—In cases of tort or wrong-doing by a partner or agents of the firm through which the firm becomes liable, the obligation is joint and several and not joint as in the case of contract. Hence the action may be brought against one or more, or against all. (Howe v. Shaw, 56 Me. 291.)

Sec. 535. ACTIONS BY AND AGAINST THE FIRM.—A partnership may be called by a collective name for convenience, but it is not recognized in law as a person, and cannot sue or be sued in the firm name unless the State statutes authorize such suits.* Hence all the actual and ostensible partners should join in the action upon a firm claim, unless it results from a contract under seal made in the name of one partner, when it should be brought in the name of such partner.** The individual names of all the partners should be stated as plaintiffs, whether the action is upon a contract claim or arises from a tort against the firm.***

In actions against the firm arising from contract, all the partners, actual and ostensible, should be joined as defendants. This is because the liability is said to be

* By statute in many states partnerships are authorized to sue and be sued in the firm name without setting forth the individual names of the partners. Such statutes usually require firms with fictitious firm names to register the names of the partners comprising such firm, as a pre-requisite to bringing suits in the firm name. See Rev. Stat. Ohio, Secs. 5011, 5042, 6499, and 3170-1 to 3170-7. Parsons, J., Part., Sec. 76.

** Mechem on Part., Sec. 224; State v. Merritt, 70 Mo. 275.

*** Sindelare v. Walker, 137 Ill. 43; Bigelow v. Reynolds, 68 Mich. 344.

joint and not several. But statutes in many States have made the obligation both joint and several, and in these States the plaintiff may sue any or all of the partners.* In actions against the firm for torts committed by its servants or agents, the liability is also joint and several, and suits may be brought against all or any of the partners.

Sec. 536. ACTIONS BETWEEN PARTNERS. —A partnership is made up of individuals, and it is by and against these individuals that suits are brought. Hence if a partner would sue his firm, or a firm one or more of its partners, the difficulty arises that the same party is joined as both plaintiff and defendant. As a result of these difficulties actions at law by a partner against the firm, or by the firm against a partner, cannot be maintained before dissolution, and such claims must be adjudicated in a court of equity.**

Where all the partnership business is settled, or a

*In Ala., Ark., Colo., Ga., Ia., Ks., Ky., Miss., Mo., Mont., N. J., N. M., N. C., and Tenn., the action is joint and several. (Mechem on Part., Sec. 228)

**Professor Mechem states the reason for the rule to be "that it is ordinarily impossible to determine whether the firm is really indebted to the plaintiff partner or not until the partnership accounts are settled and the true standing of the parties ascertained; and the process and remedies afforded by a court of law are not usually adequate or appropriate to the investigation of claims requiring such an accounting." Part., Sec. 131. But if the parties have adjusted their accounts, as by an "account stated," the objection to a suit at law is removed and it may be maintained for the balance found due. (Idem.) See Remington v. Allen, 109 Mass. 47; Pico v. Cuyas, 47 Cal. 174.

special partnership involving a single transaction has been formed, or the accounts are easily adjusted, such suits at law may be brought. (Clarke v. Mills, 36 Kans. 393; Wheeler v. Arnold, 30 Mich. 304.)

The rule extends to prevent one partner from suing another upon matters growing out of partnership transactions, unless there has been an accounting and a balance found in his favor. But upon claims connected with, but arising from, or subsequent to, the partnership, suits may be maintained between the partners, as for breach of agreement to form partnership, failure to contribute capital as agreed, failure to indemnify, or for dissolving the partnership contrary to agreement.*

Partners may of course sue each other in regard to matters unconnected with the firm as freely as other individuals.

"In the absence of a statute authorizing it, one firm cannot maintain an action at law against another firm if there are partners common to both firms. The death of the common partner will not remove the impediment as to matters arising before the death, nor will the dissolution of the firm. The nature of the claim is immaterial, if it is an obligation in favor of one firm and against the other as such. The forum for actions in such cases is the court of equity."**

* Mechem on Part., Secs. 134-145, and cases cited. Hill v. Palmer, 56 Wis. 123; Bagley v. Smith, 10 N. Y. 489; Miller v. Bailey, 19 Oreg. 539; Cook v. Canny, 96 Mich. 398.

**Mechem on Part., Sec. 147; Hall v. Kimball, 77 Ill. 161; Beacannon v. Liebe, 11 Oreg. 443.

Sec. 537. SAME SUBJECT—IN EQUITY.—"The court of equity is the chief and appropriate tribunal for the settlement of all controversies growing out of partnership transactions as such. Its principal function is in winding up the partnership affairs and arriving at the respective interests therein of the partners and creditors, but its aid may often be sought in other matters." (Mechem on Part., Sec. 148.)

A court of equity will in proper cases specifically enforce stipulations between the partners, but will seldom enforce the specific performance of an agreement to form a partnership. (Morris v. Peckham, 51 Conn. 128; Somerby v. Buntin, 118 Mass. 279.)

Equity courts will also grant injunctions to protect a partner against injurious acts of his copartners, either before or pending or after dissolution of the partnership.* And upon good grounds a receiver will be appointed to wind up the partnership affairs upon dissolution, or before dissolution, if the assets are being dissipated. (Word v. Word, 90 Ala. 81; Shannon v. Wright, 60 Md. 520.)

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* "Before dissolution, and for the very purpose often of obviating the necessity for a dissolution, injunctions may be granted to prevent the commission by the partners of acts inconsistent with the terms of their agreement, or violating the rights of their copartners. Thus, one partner may be enjoined from obstructing or impeding the business; excluding another partner from his rightful share in the management; interfering with the servants of the firm; removing the books or papers of the firm, etc.

"Pending an application for a dissolution or for an accounting, injunction may be issued to restrain one partner from in-

Equity courts also allow an accounting before dissolution to adjust demands and claims between partners, in a few cases: As, 1. Where one partner has withheld from his copartners the profits arising from some secret transaction. 2. Where the partnership is for a term of years, and one partner has sought to exclude or expel his copartner or drive him to a dissolution. 3. Where the partnership has failed, the partners are numerous, and a limited account is best for all. 4. Where the partnership articles provide for accountings at stated intervals. (Lindley on Part. (Ewell's ed.) 495; Mechem on Part., Sec. 153.)

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terfering with the property, creating new liabilities, and the like.

"After dissolution, one partner may be enjoined from wasting, injuring, disposing of or wrongfully dealing with the assets; from holding out the complainant as being still a partner, etc." (Mechem on Part., Sec. 153.)

CHAPTER III.

PRINCIPLES BY WHICH THE BUSINESS IS WOUND UP.

Sec. 538. REASONS FOR DISSOLUTION.—Partnership being founded upon an agreement, express or implied, between the parties, it follows that it may be dissolved or brought to an end in the same way that it arose—by the act of the parties. But being also a relation, if not a status, given well-defined powers by rules of law, it may also be determined by operation of law upon the happening of particular events, or because of dissensions between the partners incompatible with the relation.

Sec. 539. SAME SUBJECT—DISSOLUTION BY ACT OF THE PARTIES.—On assuming the relation the partners may expressly agree that it shall continue for a stated time, and the lapse of this time works a dissolution, unless continued by a new agreement. And where a definite object or single transaction is the purpose of the partnership, the accomplishment of this object works a dissolution. (Bohrer v. Drake, 33 Minn. 408.)

So by mutual consent the partners may terminate the partnership, or by refusing to go on with the business impliedly terminate it by consent. Where the partner-

ship is one for the existence of which no definite time is fixed, called a partnership at will, it may be terminated by any partner whenever he desires.* And though the partnership is to exist for a stated period, one partner may by agreement have the right to dissolve the partnership on notice, or on the happening of some specified event. For violation of an agreement to continue in a partnership for a stated period, the partner is liable in damages, but he may nevertheless withdraw from the firm.** A sale of his interest by a partner, or a sale upon execution, works a dissolution. (Blater v. Sands, 29 Kans. 551.)

Sec. 540. SAME SUBJECT—DISSOLUTION BY OPERATION OF LAW.—The happening of any of the following events cause a dissolution of the partnership: The death of a partner; the marriage of a feme sole partner at common law; the bankruptcy of a partner or his assignment for benefit of creditors; the insanity or lunacy of a partner or his being but under guardianship; and the declaration of war between the countries of which the partners are citizens. (J. Parsons, Part., Sec. 173; Mechem on Part., Secs. 245-250.)

Dissensions arising between the partners of so serious a nature as to render the partnership impracticable will furnish ground for a dissolution by a decree of the

*Blake v. Sweeting, 121 Ill. 67; Howell v. Harvey, 5 Ark. 270; Walker v. Whipple, 58 Mich. 476.

**Mechem on Part., Sec. 239; Skinner v. Dayton, 19 Johns. 514. But see Story on Part., Sec. 275.

equity courts.* Thus, for fraud of a partner, or misconduct working irreparable mischief, the court will decree a dissolution. Also for the failure or impossibility of successfully conducting the business a dissolution may be decreed.

Partners may agree that a death of one of their number shall not terminate the partnership, but such an agreement will not be implied. The real firm does not survive, though said to, as the agreement merely operates to create a new partnership. The executor or administrator of the deceased partner adds a new member to a new firm. See J. Parsons, Part., Secs. 71-75.

Sec. 541. NECESSITY OF NOTICE OF DISSOLUTION.—The proper method of exercising the right to dissolve a partnership by the act of one or all of the partners is, by notice to that effect, to the other partners, to creditors of the firm and to third persons. When a partnership is dissolved by operation of law, as by death of a partner, notice is unnecessary, but in all other cases, including dissolution by judicial decree, notice in some form is required.

The general rule is that actual notice of dissolution must be given to former creditors of the firm, and notice by publication to other persons. To persons who have dealt with the firm a notice is insufficient which

*Oteri v. Scalzo, 145 U. S. 578; Rosenstein v. Burns, 41 Fed. Rep. 841; Holladay v. Elliot, 8 Oreg. 84; Groth v. Payment, 79 Mich. 290. Misconduct of a partner in excluding another partner from his joint control of the business, dishonesty, lunacy, abandonment of the business and the like have been held good causes for decreeing a dissolution. (J. Parsons, Part., Sec. 173.)

has not been received, but to strangers notice by publication is sufficient though not observed by them.* The dissolution arising from the withdrawal of a dormant partner requires no notice to creditors or others, as they have not known of his connection with the firm and have not looked to his credit. But the rule is otherwise if the dormant partner was in fact known to persons as a partner.**

The question when the partnership is dissolved is a question of fact. If it is a partnership at will, the dissolution dates from notice to the copartners, as between the parties, but does not release the partners from being bound as to third persons or creditors until notice is given them. (Morrill v. Bissell, 99 Mich. 409.) If the dissolution is by decree, it dates from the rendition of the decree.

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*Austin v. Holland, 69 N. Y. 571. Holding that a letter or circular to a former creditor of the firm is insufficient unless actually received. But knowledge of the dissolution is sufficient to relieve the partners from further liability, however acquired by the creditor. (Mechem on Part., Sec. 262.)

**Elmira Iron Co. v. Harris, 124 N. Y. 280; Pitkin v. Benfer, 50 Kan. 108; Lieb v. Craddock, 87 Ky. 525.

Notice to Strangers. To persons who have never heard of a partnership until its dissolution no notice at all is necessary, but to those who knew of its existence, but have not dealt with it, some notice of dissolution is necessary. This is usually given by publication of notice of dissolution in a newspaper circulating where the partnership business has been conducted. But this published notice is not the only way the partners may satisfy the requirement of notice. Any method by which the fact of the dissolution is made apparent and notorious to the general public will answer. See Lovejoy v. Spafford, 93 U. S. 430; Cook v. Slate Co., 36 Ohio St. 135; Central Nat'l Bk. v. Frye, 148 Mass. 498.

Sec. 542. THE EFFECT OF DISSOLUTION.—The dissolution per se puts an end to a partner's authority to bind his copartners. (Nichols v. White, 85 N. Y. 431.) He cannot create new obligations, or vary the character, form or obligation of those already existing.* The dissolution changes the authority of each partner, and limits it to what is necessary to wind up the affairs of the firm. The winding up may involve collection, payment and the carrying out of unfulfilled or continuing obligations, but it is all winding up. In the absence of agreement the authority of each partner continues to sell the property of the firm to pay debts in winding up, and where the firm has made a continuing obligation or contract which outlives the firm, this must be carried out by the partners, even after a dissolution. A contract with a firm for a specific time will continue after dissolution unless the contract is in reliance upon a particular partner whose retirement would defeat the object of the contract, or the dissolution disables the firm to perform the agreement.

The partners may agree that one of their number shall act for all in the winding up of the firm affairs, and when such an agreement is made, the liquidating or winding up partner has the firm's capacity for the purpose of settling the firm business. (J. Parsons,

*Mechem on Part., Sec. 272; Clement v. Clement, 69 Wis. 599; White v. Tudor, 24 Tex. 639; Humphries v. Chastain, 5 Ga. 166. Holding that after dissolution a partner cannot make, accept or indorse commercial paper, create a new or revive an old debt against the firm, bind them by admissions, or renew a claim barred by statute of limitations.

Part., Sec. 184.) But his powers are limited to such as are necessary to wind up the partnership transactions. (Hilton v. Vanderbilt, 82 N. Y. 591.)

If the dissolution has been caused by the death of a partner the interest all centers in the survivor or survivors to wind up the firm. And such surviving partner or partners must alone bring suits relating to the partnership, and the representative of the deceased partner is not to be joined. The surviving partner has no authority to continue the partnership unless to meet the necessity of a continuing contract. The administrator of a deceased partner can compel the winding up of the firm, and prevent misconduct on the part of the surviving partner. (Valentine v. Wysor, 123 Ind. 47.)

A claim against a legally dissolved partnership is brought against the surviving partner by an action at law. A partnership claim may also be presented and allowed against the estate of a deceased partner.

The assignee of a bankrupt partner takes all the interest of the assignor, and joins with the surviving partner in suits on firm claims.

The partners may agree that a retiring partner shall be indemnified by the continuing firm or partner, and this contract may be either to pay the debts or to save the retiring partner harmless. As between the partners, if the contract is to pay the debts, this must be done, and the retiring partner need not be damaged to compel them to do so, otherwise, if the contract is to save him harmless. But these agreements as to existing debts do not affect third persons creditors of the firm, unless they assent to the arrangement, and

upon consideration agree to look to the continuing partner, and such assent will not be implied from mere silence.*

Sec. 543. THE PARTNERS' EQUITABLE LIEN.—The partners have the right to have the assets of the firm applied to pay firm debts, and this is called or amounts to an equitable lien on the partnership property before or after dissolution to have such property or assets applied to the firm liabilities; and a like lien exists to have the surplus assets paid to themselves in proper proportion. (Pearson v. Keedy, 6 B. Monr. 128.)

This lien of each partner exists against all other partners or persons claiming through them as executors, creditors, assignees, and the like. (Kirby v. Schoonmaker, 3 Barb., Ch. 46.) And extends to all sorts of firm property; fungible property which has been replaced by new property is covered by it. Where the partners have changed their joint interest into several interests by agreement, as by dividing the property, transferring or selling it to one of their number, and this agreement is executed, a partner loses his interest in the firm, and also his lien or equitable right to have the property applied to the debts of the firm, and becomes a mere unsecured creditor.**

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*Vanness v. Dubois, 64 Ind. 338; Hobbs v. Wilson, 1 W. Va. 50; Smith v. Sheldon, 35 Mich. 42; Bank v. Green, 40 Ohio St. 431.

**Mechem on Part., Secs. 280-3; Lindley on Part. (Ewell's 2d ed.), 352-355. The lien of the partners only covers amounts due to or from the firm by or to the members as partners, and

While the firm is solvent and undissolved, the partners, by agreement, may do whatever they please with the assets, if done in good faith. Thus they may sell the property to one and agree that he is to pay the firm debts, and though this changes the property into separate property, and puts an end to the partner's lien on the property, and to that of the creditors' which depends upon the lien of the partner, the transaction is good. Otherwise, though, if the firm is insolvent or about to become so. (Fulton v. Hughes, 63 Miss. 61; Stanton v. Westover, 101 N. Y. 265; Darby v. Gilligan, 33 W. Va. 246; s. c. 6 L. R. A. 740.) See Bulger v. Rosa, 119 N. Y. 459.

Sec. 544. PRINCIPLES GOVERNING THE WINDING UP, OR FINAL ACCOUNTING.—The settlement of the final accounts of a firm should begin at the first of the joint dealings unless there has been periodical final settlements, and should end with the close of the partnership, unless some of the partners continue it without authority. Solvent partners may voluntarily close up the business, settle their accounts and divide the surplus. Where the firm is insolvent, the partners cannot agree, or conflicting claims arise, the intervention of a court of equity is necessary. Any partner may demand an accounting, but must not allow his claim to become stale through delay or laches. (Bell v. Hudson, 73 Cal. 285.)

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does not cover a loan by the firm to a partner for a private purpose of the partner. (Idem.) And there is no lien if the partnership is an illegal one.

Sec. 545. SAME SUBJECT—METHOD OF ACCOUNTING.—In general the method of a partnership accounting is as follows:

1. Ascertain how the firm stands toward all persons not partners.

2. Ascertain what each partner is entitled to charge in account with his copartners, including, (a) what each has brought in, whether as capital or advances, (b) what each should have brought in but has not, (c) what each has taken out more than the others.

3. Apportion profits to be divided, or losses to be made up, and ascertain what each has to pay to the others so as to settle cross claims.

When the accounting is completed the assets are distributed in the following order:

1. In paying the debts due third person by the firm.

2. In repaying to each partner his advances.

3. In repaying to each partner his capital.

4. The balance being distributed as profits, and in equal proportion, unless a contrary agreement be shown. (Lindley on Part., 402.)

1. Firm Debts.—Partnership debts on dissolution must be paid first. The individual partners, or others claiming through them, can in no wise compete with the claims of the firm creditors. (Edison Illuminating Co. v. De Mott, 51 N. J. Eq. 16.) This is because the partnership property is expressly or impliedly contributed for partnership purposes, and the assent and desire for its application to the discharge of firm debts by the partners is presumed. So a levy upon a partner's share can only be made upon the final surplus, and must yield priority to subsequent levies for debts due the firm. (Jarvis v. Brooks, 27 N. H. 37; Bullock

v. Hubbard, 23 Cal. 495; Mechem an Part., Sec. 289.) So, if a partner mortgages or incumbers his interest, it is subject to the claims of firm creditors. And joint creditors of the partners as individuals are not partnership creditors and cannot participate in the assets of the firm until firm debts are paid. (Forsyth v. Woods, 11 Wall. 484.) A partner is a member of the firm, and hence cannot be considered a firm creditor so as to compete with genuine firm creditors. Nor can the creditors of a partner claiming through him compete with the firm creditors. And the only way a partner's interest in the firm can be reached is by distributing the assets in the proper order, paying creditors, repaying advances, etc., until the amount actually due the partner is determined. (Buchan v. Sumner, 2 Barb., Ch. 165; Mechem on Part., Sec. 292.)

If the firm assets are insufficient to pay firm liabilities the partners are individually responsible for their payment. And where two classes of creditors have to compete for the separate property of the partner, the separate creditor is given priority over the joint or partnership creditor in the individual property of the partner, unless the joint estate of the partners is worthless. (Hundley v. Farris, 103 Mo. 78; Rodgers v. Meranda, 7 Ohio St. 180; Harris v. Peabody, 73 Me. 262; in re West, 39 Fed. Rep. 203.) The priority of the partnership creditors being founded upon the equitable rule of the partners' right to have firm debts paid out of the firm property, is not affected by the condition of the separate creditors.

2. Accounts Between Partners.—If in winding up

the affairs of the firm are in the hands of one of the partners . r settlement, his responsibility is one of reasonable diligence. Ordinarily compensation for services in winding up will not be allowed, but this rule is not inflexible. A partner is responsible for losses arising from his misconduct, but not for an honest error or judgment.

Capital does not bear interest in partnership settlements unless it has been so stipulated. But advances or loans made by a partner to the concern do draw interest, as they are treated as an ordinary debt. Profits left in the firm do not bear interest without agreement. But a partner whose duty it is to account may be charged with interest if he unreasonably retards the settlement of the partnership affairs, and in case of bad faith annual rests may be made, and he be charged with compound interest.

Sometimes a person is obliged to pay a premium for being admitted into a firm. This payment when made becomes the exclusive property of the seller and not of the firm. In case of a dissolution before the time stated in the articles, it may become necessary to repay part of this premium on such equitable terms as will be just in the particular case.

Where there is no partnership in fact, but merely an ostensible partnership as to third persons, as where a person has been held out as a partner, the property in the business is treated in equity as the joint property of the parties held out as partners until all creditors who have relied on the ostensible partnership are paid. But a dormant partner, where there was no ostensible

partnership, has no right to have the property applied to firm debts, and the creditors of the firm have no priorities as against separate creditors.*

Sec. 546. SAME SUBJECT — SHARING LOSSES.—When the assets of the dissolved firm are insufficient to pay the claims against the firm to third persons, it becomes necessary for the partners to ratably contribute to meet the loss. The sharing of losses, in the absence of agreement, is in the same proportion as the profits are to be shared. (Whitcomb v. Converse, 119 Mass. 38.) But where one partner contributes all the capital and the other his experience, upon dissolution the partners will take as they contributed, the one the capital, and the other his experience, and in case of loss of the capital, the other partner may be held to aid in making good the loss. (Idem.) If some of the partners are insolvent the entire loss rests upon the solvent parties.

Sec. 547. CONCERNING THE ACTION OF ACCOUNTING.—The statute of limitation is not technically a bar to a suit for an accounting, but if a great length of time has elapsed without action on the part of the complainant, the court may refuse to entertain the suit on the ground of negligence. (Bell v. Hudson, 73 Cal. 285.)

A demand for settlement is not necessary before bringing the suit, and the omission only affects the matter of costs. It is sometimes said that the pend-

*Mechem on Part., Sec. 299; Thayer v. Humphrey, 91 Wis. 276; Whitworth v. Patterson, 6 Lea. (Tenn.) 119

ency of a suit for an accounting is a bar to a second suit for the same purpose; this is not strictly true, but the court of equity will compel the plaintiff to elect which of the two suits he will follow. Pending dissolution or the accounting a receiver may be appointed, and a partner who owns capital in the firm should be preferred to a third person as receiver, unless he is an unfit person.

When the partnership accounts have been settled and a decree rendered, they are not to be reopened unless within a reasonable time and upon proof of fraud, or error as to some matter unknown to the complaining party when it was committed. If a fraud is clearly proven to have been committed in the first accounting, the account will be reopened, though considerable time have elapsed.*

Sec. 548. LIMITED PARTNERSHIPS.—Limited partnerships exist in all of the States, and under almost similar statutes. It changes the liability of the special partner, from a general liability for all firm claims to the payment of a limited amount. Hence the purpose of limited parnerships is:

1. To bring into co-operation men having capital and willing to risk a limited amount of it, but not all, and men without capital, but with enterprise, skill and capacity.

2. The protection of that part of the public who deal with limited partnerships, in giving them precise

*Mechem on Part., Sec. 309; Valentine v. Wysor, 123 Ind. 47; King v. White, 63 Vt. 158.

knowledge to what extent they may give credit with hope of payment from the firm.

Sec. 549. SAME SUBJECT—THE STATUTORY REQUIREMENTS.—The existence of limited partnerships depends upon the statutes, and in general the statute must be strictly followed. They usually require the execution and filing of a certificate stating: 1. The firm name under which the partnership is to be conducted. 2. The general nature of the business to be transacted. 3. The names of the partners interested, distinguishing which are general and which are special, and giving their places of residence. 4. The amount of cash which each special partner has contributed. 5. The date on which the partnership is to commence and when it is to terminate. This certificate is to be acknowledged before some person authorized by law to take the acknowledgments of deeds. It is then filed in some public office, usually that of the clerk of the county in which the business is to be transacted. Also, generally, an affidavit is required to be filed stating that the sums to be contributed by the special partners have actually been paid in and in cash.

The limited partnership in some States may carry on any kind of business, in others they cannot engage in banking or insurance.* In all States the limited partnership consists of one or more general partners who are responsible in the ordinary way to the full extent of all firm claims, and one or more special partners who are only liable for the amounts they have paid in. The

*Rev. Stat. of Ohio, Sec. 3141; Cal. Code, Sec. 2477.

business is conducted in the name of the general partners, and some statutes require all the names of the general partners to appear in the firm name or be displayed where the business is conducted. And this firm name may be required to end with the word "limited." The names of the special partners must not appear in the firm name on penalty of becoming general partners.

If any false statement is made in the certificate or affidavit, all persons interested become liable as general partners. The statutes may require published notice of the formation of the limited partnership, and for not doing so the partners become liable as general partners. And all statutory requirements must be fully and substantially performed, and failure will not be excused though innocently or inadvertently omitted; if the law is not fulfilled the partners become general partners.**

Unless renewed as a special partnership at the end of the time stated in the certificate, the partnership must be dissolved, or become a general partnership. If the partnership is dissolved at the time stated in the certificate, no dissolution notice is necessary, but if terminated before the time stated, either by the act of parties or by operation of law, notice becomes necessary as in the case of a general partnership.

**See Rev. Stat. Ohio, Secs. 3141-3161, for limited partnership act. When special partners liable as general partners to third persons, see Sheble v. Strong, 128 Pa. St. 315; Manhattan Co. v. Laimbeer, 108 N. Y. 578; Briar Hill C. & I. Co. v. Atlas Works, 146 Pa. St. 290; Selden v. Hall, 21 Mo. App. 452.

Sec. 550. LIMITED PARTNERSHIP ASSOCIATIONS.—Some States have provided by statute for the organization of limited partnership associations, which are neither partnerships nor corporations, but perhaps resemble the latter more than the former. The statutes provide that a number of persons—in Ohio not less than three nor more than twenty-five—may unite in the conduct of any lawful business for a period of years, except banking or dealing in real estate, by subscribing and contributing capital thereto, and that by following the prescribed statutory formalities, no one of such persons shall be liable for the debts of such association beyond the amount which he has subscribed.

The requirements in formation resemble those for limited partnerships, as to the filing of a certificate with names of the parties and the amounts contributed by each; further, they require the amounts subscribed to be paid in within a stated time; the name of the association to be used in all matters and followed by the word "limited;" require meetings of the members periodically, and the election of managers and officers for the conduct of the business of the association; and limit the amounts for which the managers may bind the association by parol, and require the keeping of a register of debts and liabilities of the firm, and the entering therein of all debts and liabilities contracted. Unless the statute is strictly and closely followed, the members become liable as general partners. See Ohio Stat., Secs. 3161a-3161m.

HELPS TO STUDENTS.

It is unnecessary to repeat here the importance of the two legal subjects which are treated in this number of the Home Law School Series. Contracts and Partnerships, and the principles of law governing them, are of daily use in the commercial world, and should be fairly well understood by every adult citizen. Many vexatious disputes and costly suits at law would be avoided if men of business were sufficiently informed in the elements of law as to be able to observe the common essentials required in making valid contracts, and establishing the partnership relation. The author believes that a fair knowledge of these essential principles may be gleaned from the foregoing pages. It only remains to give some simple and practical forms, with appropriate wordings for the formation of contracts and the establishment of partnerships, and thus illustrate in the concrete what we have been discussing.

It is not to be understood that a contract, or articles of partnership must conform to any specific wording; if the necessary elements or essentials are present the form is immaterial. But the individual or lawyer who desires his agreements to go unchallenged will not be unmindful of the usual way in which such agreements are drawn.

The essential elements of a written agreement, as has been seen in the foregoing pages, are: 1. Parties competent to contract, whose names should appear in the writing. 2. The subject-matter of the contract, or a clear statement of what is to be done or omitted. 3. A consideration, lawful and valid, or, if made up of mutual promises, then a clear and explicit statement of what each party agrees to do. 4. Assent of the parties, which would be evidenced by their signing the agreement as written, under circumstances showing their voluntary consent to its terms. The forms appended are simply illustrative of the manner in which agreements are usually made. They may be easily modified to suit particular conditions or circumstances.

Beginning and Ending of a Simple Contract.

This Agreement, made and entered into this 15th day of October, 1899, by and between John Doe, of Conneaut, Ohio, party of the first part, and Richard Roe, of the same place, party of the second part, Witnesseth:

That, etc. (here filling in the terms of the agreement).

In testimony whereof, the said parties have hereunto set their hands the day and year above mentioned.

John Doe,
Richard Roe.

Agreement for Sale and Delivery of Coal.*

Memorandum of agreement, made this day between John Doe and Richard Roe, both of Conneaut, Ohio,

*Some such memorandum as this is necessary to satisfy the seventeenth section of the Statute of Frauds where it is in force.

as follows: That he, the said Richard Roe, for the consideration hereinafter mentioned, hath sold, and by these presents doth agree to deliver to the said John Doe, at his factory in Conneaut, free of all charges and expenses whatsoever, three thousand bushels of coal, from time to time, between the date of these presents and the first day of January next, in such quantities and at such times as the said John Doe shall require, and the whole to be delivered on or before the said first day of January; and the said John Doe agrees to pay to the said Richard Roe, the sum of —— cents per bushel, the said sum to be paid in cash on the first day of January next.

Witness our hands this first day of October, A. D. 1899.

John Doe,
Richard Roe.

Agreement for Building a House.

This Agreement, etc. (same as in first form), witnesseth:

That the said R. R. agrees to construct for the said J. D. at Conneaut, Ohio, a two-story frame house, according to plans and specifications hereto annexed and made a part of this agreement.* And the said R. R. further agrees to furnish all materials necessary to the construction of the said house, and to perform the work, and finish and complete the said house, accord-

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*The Plan or drawing should show the dimensions of the house, thickness of walls, height of each story, size of rooms, doors, windows, and the position and number of closets, pantries, sinks, etc. The Specifications should include all the work and explain the manner in which it is to be done, and the kind of material to be used.

ing to the plans and specifications, on or before the —— day of ——, 1899.

In consideration of the said service by the said R. R. the said J. D. agrees to pay the said R. R. the full sum of $1,500.00 in installments, as follows, to wit: $500.00 when the foundation for said building is completed according to the plans and specifications; $500.00 when the said building is enclosed; and the balance of $500.00 when the said building is completed according to the plans and specifications.

(Add any special agreements as to extra work, alterations, right to dismiss employes, etc.)

In witness whereof, etc.

Common Form of Bond.

Know all men by these presents that I, John Doe, of Conneaut, Ohio, am held and bound unto Richard Roe, of Cleveland, Ohio, in the sum of one hundred dollars,* lawful money of the United States, to be paid to the said Richard Roe, his attorney, executors, administrators, or assigns; to which payment well and truly to be made, I do bind myself, my heirs, executors, and administrators, and every one of them, firmly by these presents. Dated, this 1st day of October, A. D. 1899.

The condition of this obligation is such that if the said bounden John Doe, shall well and truly pay the said Richard Roe, his executors, administrators, or assigns, the full sum of fifty dollars, lawful money, with legal interest for the same, on or before three months from the date hereof, without fraud or further delay,

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*This amount is called the "penal sum," and is usually larger than the amount to be actually paid. But in suit on a bond the whole sum named as a penalty cannot be recovered, but only the amount due and the damages caused by the failure to pay or perform the thing stipulated.

then this obligation to be void and of none effect, otherwise to remain in full force and virtue in law.

John Doe.

This may be sealed and witnessed thus:

Signed, sealed and delivered
in presence of

A. B.
C. D. John Doe (L. S.).

Form of Warranty Deed.

Know all men my these presents, that I, John Doe, a single man, of Conneaut, Ohio, the grantor, for the consideration of one thousand dollars ($1,000.00), received to my full satisfaction of Richard Roe, of the same place, the grantee, do give, grant, bargain, sell and convey unto the said grantee, his heirs and assigns, the following described premises, situated in the Township of Monroe, County of Ashtabula, and State of Ohio, and known as (here give the description of the premises sold by metes and bounds, or by lot number and plat), be the same more or less, but subject to all legal highways.

To have and to hold the above granted and bargained premises, with the appurtenances thereunto belonging unto the said grantee, his heirs and assigns forever. And I, John Doe, the said grantor, do for myself, and my heirs, executors and administrators, covenant with the said grantee, his heirs and assigns, that at and until the ensealing of these presents, I am well seized of the above described premises as of a good and indefeasible estate in fee simple, and have good right to bargain and sell the same in manner and form as above written; that the same are free and clear from all incumbrances whatsoever. (Here except any incumbrance that may exist.) And that I will warrant and defend said premises, with the appurtenances

thereunto belonging, to the said grantee, his heirs and assigns forever, against all lawful claims and demands whatsoever.

(If the grantor is married, the wife should be joined as grantor, and should also release her dower as follows):

And I, the said Mary Roe, wife of said John Doe, do hereby remise, release and forever quit claim unto the grantee, and his heirs and assigns, all my right and title of dower in the above described premises.

In witness whereof we have hereunto set our hands and seals, the tenth day of October, in the year of our Lord, one thousand eight hundred and ninety-nine.

Signed sealed and delivered
in presence of
John Clark,
Peter Hoyt. John Doe (Seal).

The State of Ohio, Ashtabula County, ss.

Before me, a Notary Public in and for said county, personally appeared the above-named John Doe, a single man, who acknowledged that he did sign and seal the foregoing instrument, and that the same is his free act and deed.

In testimony whereof I have hereunto set my hand and official seal at Conneaut, Ohio, this tenth day of October, A. D. 1899. John Clark,
(Notarial Seal.) Notary Public.

Partnership Forms.

Articles of Partnership.

This agreement, made this first day of October, A. D. 1899, between John Doe, Richard Roe and James Smith, all of the Village of Conneaut, County of Ashtabula, and State of Ohio, witnesseth:

The said parties have agreed, and by these presents do agree, to associate themselves as partners in the

business of buying, selling, vending and retailing all sorts of goods, wares and commodities belonging to the business or trade of retail clothiers and furnishers; which said partnership shall continue from the date of this agreement for, during and to the full term of four years next ensuing.

Each of the said partners has this day delivered in, as capital stock, the sum of $1,000.00 in cash, to be laid out and used in common between the parties to this agreement, for the management of the said business to the general advantage.

And it is further agreed between the said parties, that the name of the partnership hereby formed shall be "John Doe & Company." That the said business shall be carried on at Conneaut, Ohio.

That each of the said partners shall during the existence of this partnership give his undivided time to the common business, and shall not during its existence follow any other trade or calling to his own private benefit.

That all profits, gains and increase which shall be made in the conduct of the said business shall be equally and proportionately divided between them, share and share alike. And all losses that shall arise from the conduct of the business shall be borne equally between the said partners.

It is further agreed that, during the said term, or so long as the joint business shall continue, there shall be kept perfect, just and true books of accounts, in which each partner shall cause to be entered all transactions or dealings affecting the firm business. And the said books shall at all times be accessible to either of the said partners at the place of business of the firm.

That once in each year, or more frequently if a majority of the partners shall so decide, a full and complete inventory of the stock on hand shall be taken, and an accounting shall be had between the said partners,

the profits or losses of the business determined, and each partner receive his share of profits, or contribute his share of losses.

And at the end of the said term of four years, or sooner, if the said partnership be terminated by any cause, the said copartners shall render each to the other, or in case of the death of either of them, the surviving partners to the executor or administrator of the deceased, a true and final account of all partnership affairs, and upon making such account, all the stock and profits which shall remain when the firm debts are paid, shall be equally divided between the said copartners, their executors or administrators, share and share alike.*

In witness whereof, we have hereunto set our hands, the day and years first above written.

John Doe,
Richard Roe,
James Smith.

Certificate for Limited Partnership.

The undersigned persons being desirous of forming a limited partnership as authorized by the statutes of the State of Ohio, do hereby make and sign the following certificate for that purpose:

1. The name or firm under which the said partnership is to be conducted is "John Doe & Company."

2. The names of all the general and special partners

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*The Articles may also contain stipulations as to the amounts each partner may draw out of the firm monthly for living expenses; limit the authority of the partners in the transaction of firm business; give the surviving partners, or any of them, the right to purchase the interest of a deceased or retiring partner and continue the business; give one partner the authority to manage and conduct the business for the common interest, while the other partners take no active part in it, etc.

are John Doe, Richard Roe, and James Smith, and the place of residence of each of the said persons is Conneaut, Ohio. Of these partners John Doe is the general partner, and Richard Roe and James Smith the special partners.

3. The amount of capital which Richard Roe and James Smith have contributed to the common stock is $1,000 each, in cash.

4. The general nature of the business to be transacted by said partnership is the buying, selling and vending of goods at retail as clothiers and furnishers.

5. The said partnership is to commence on the first day of October, 1899, and to terminate October 1st, 1903.

In witness whereof we have hereunto set our hands and seals this 15th day of July, 1899.

John Doe,
Richard Roe,
James Smith.

The State of Ohio, Ashtabula County, ss.:

Before me, a Notary Public in and for said County, personally appeared the above-named John Doe, Richard Roe and James Smith, who acknowledged that they did sign the foregoing certificate for the intents and purposes therein specified.*

(Notarial Seal.) John Clark, Notary Public.

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*This certificate as acknowledged must be entered for record by the recorder of the county in which the principal place of business of the partnership is situated in a book kept for the purpose. Rev. Stat. Ohio, Sec. 3145. Also in Ohio, the partners must publish, in a local newspaper of general circulation, for six weeks immediately after it is recorded, a copy of the certificate, and this must be done in each county where the partnership has a place of business.

In some States an affidavit must also be filed with the certificate to the effect that the special partners have actually and in good faith paid in, in cash, the amounts contributed by them.

The Partnership as Plaintiff.

When a partnership is plaintiff or defendant, even though the statutes permit suits to be brought in the firm name, it is best to state the names of all the partners thus:

John Doe, Richard Roe and James Smith, partners, doing business under the name and firm of John Doe & Company, plaintiffs (or defendants).

If the suit is by or against a surviving partner, the proper form would be:

John Doe, surviving partner, of Richard Roe and James Smith, late partners, under the name and firm of John Doe & Company.

Dissolution Notice.

Notice is hereby given that the copartnership previously existing between John Doe, Richard Roe and James Smith, under the name and firm of John Doe & Company, and doing business at Conneaut, Ohio, has been dissolved by mutual consent from and after this date.

Dated, Conneaut, Ohio, November 1, 1899.

John Doe,
Richard Roe,
James Smith.

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QUESTIONS FOR STUDENTS.

The questions are numbered to correspond with the sections in this book. The answers and references for further study may be obtained by referring to the corresponding sections.

CONTRACTS.

CHAPTER I.

402. What may be said of the importance of contracts in society?

403. Explain the purpose of the law of contracts.

404. How does an implied contract arise? Give Blackstone's definition of an implied contract.

405. Define a contract. What other terms are used synonymously with "contract?"

406. What are the essential elements of a contract? Briefly explain each.

407. What is the most general classification of contracts? Explain what is meant by a "specialty;" by a "simple contract."

408. Explain and distinguish between express and implied contracts. What difference in their validity and effect?

409. When is a contract "executed;" when "executory?"

410. What is meant by a "bilateral" contract; a "unilateral" contract? When is a contract said to be aleatory?

411. How may the subject of Contracts be divided for the purpose of study?

412. Mention some of the English and American writers on the subject of Contracts.

CHAPTER II.

THE FORMATION OF A VALID CONTRACT.

413. What are the elements necessary to the formation of a valid contract?

414. Explain the term "agreement" as used in reference to the formation of a contract.

415. What may be said of the nature of agreement? What is necessary to constitute an agreement, and how does it originate?

416. Is acceptance of an offer necessary to constitute agreement?

417. How may acceptance be made? Explain fully. Give an example of acceptance by conduct. Must a person expressly refuse a written offer?

418. What may be said as to the right to recall an offer? If offer is sent by letter how may it be revoked? When does the offer lapse if neither accepted nor recalled? Explain what is meant by a "reasonable time."

419. Explain "offers on time." When may they be recalled?

420. Give an example of a general or public offer. How and when may a public offer be revoked?

421. (n) Explain the making of an agreement at an auction sale. How may an offer be distinguished from preliminary negotiations? Give examples.

422. In general, what is the effect if all the terms of an offer are not communicated to the person accepting? Give the three instances cited by Anson in regard to railway tickets, and illustrate each by the case cited.

423. Must an offer be intended as such to make a valid agreement by acceptance? Give instances in which an apparent offer was held not to be one.

424. Mention the various ways in which an offer may be terminated before acceptance.

425. Explain fully the rules applicable to offers made by letter or post, as respects: (a) the continuance of the offer; (b) when and how the offer may be revoked; (c) how the acceptance is made, and when it takes effect; and (d) the effect of the letter of acceptance getting lost. Give instances of each rule.

426. What effect have postal regulations upon agreements made by post? How is the authority to accept by post derived? By what rules are offers and acceptances by telegraph governed?

427. What is meant by "reality of consent?" How are cases of unreality of consent classified?

428. What is meant by "mistake?" Explain fully. Explain and illustrate: (a) Mistake as to the nature of the transaction; (b) mistake as to the person contracted with; (c) and mistake as to the subject-matter. In what cases does mistake as to the subject-matter of the contract avoid the contract? Illustrate each case by giving an example.

429. Explain fully what is meant by "misrepresentation," and distinguish it from "fraud." What contracts are affected by misrepresentation? Why? Explain the effect of misrepresentation upon contracts, of fire insurance, marine insurance, life insurance, sale of land, and purchase of shares in companies.

430. Define "fraud," and mention the elements necessary to constitute fraud. Explain fully each of the elements of fraud. What is the effect of fraud as to remedies given the injured party? Is the contract rendered void or voidable?

431. Define and explain what is meant by "Duress."

432. What is meant by "Undue Influence?" How may the presumptions of the presence of undue influence arise? What is said of the right to rescind a contract for undue influence?

433. What is the general rule as to the necessity of consideration in a valid contract? What exception to this general rule? What is a "nudum pactum?"

434. Explain the origin of contracts under seal, or specialties? What arguments are advanced by Walker for the abolition of seals? How has State legislation affected the common law regarding seals?

435. Mention some of the distinctions between contracts under seal and simple contracts at common law.

436. Define and explain what is meant by a "deed," a "bond," and a "contract of record."

437. Must the consideration be expressed in a written contract?

438. Mention the kinds of consideration at the Roman Civil Law; at the Common Law.

439. What is meant by a "good" consideration? Is it a sufficient consideration to support a contract?

440. What is a "valuable" consideration, and of what does it usually consist?

441. What is a "full and valuable" consideration?

442. Must a valuable consideration be adequate? Who passes upon the sufficiency of a consideration?

443. What is meant by a moral obligation? When is it sufficient consideration to support a promise?

444. Mention examples of valid and sufficient considerations.

445. Discuss forbearance as a consideration.

446. Discuss work and service as a consideration; mutual promises.

447. When is a consideration treated as unreal? What is the principle as regards uncertain or vague considerations?

448. Is part payment a good consideration for the discharge of debt as a whole? Give reason for your answer. What is the rule as to payment of a sum in discharge of damages for a breach of contract? What general exception to the rule that part payment will not discharge the whole debt?

449. What is the effect upon the contract of a consideration being void in part and entire in nature? If the consideration is separable and fails in part, what is the effect on the contract? If illegal in part what is the effect?

450. Define and distinguish between "executory," "executed," and "past" considerations. What is the general rule as to a past consideration? What exceptions to this rule?

451. Discuss the effect of total and partial failure of consideration.

452. What, in general, may be said of parties to a valid contract?

453. From what causes does incapacity to contract arise?

454. Why may infants avoid contracts made during infancy?

455. What may be said as to the incapacity of married women to contract?

456. What is the test of mental deficiency which incapacitates a person to make a valid contract? Discuss contracts made by a lunatic.

457. Who are aliens? Discuss their property and contractual rights in peace and during war. What further disabilities existed at common law to prevent certain classes of persons from contracting?

458. In general, what limitations are imposed upon the right to contract? How are the limitations upon the right classified?

459. Discuss immoral agreements.

460. Discuss impolitic agreements. What may be said in regard to contracts in restraint of trade or marriage? Is a contract to stifle a criminal prosecution valid? What is meant by "maintenance" and champerty?"

461. What is meant by an illegal agreement? Mention examples of illegal agreements. What may be said of wagering contracts, and stock market gambling? What is the effect of usury upon a contract by the statutes of the State in which you live?

462. What is the effect of an illegal contract?

463. Explain what is meant by the "Statute of Frauds." What two sections of the English act are applicable to contract, and are in general force in the American States? Give the provisions of the fourth section.

464. Discuss the construction of the fourth section of the statute of frauds.

465. Discuss the nature of the contracts which fall within the fourth section. What are agreements "not to be performed" within one year?

466. What is the effect of a failure to satisfy the provisions of the fourth section? What effect has part performance on the statute?

467. Give the provisions of the seventeenth section of the statute of frauds.

468. Discuss the construction of the seventeenth section.

469. What is the effect of failing to satisfy the provisions of the sevententh section?

CHAPTER III.

THE OPERATION OF CONTRACT.

470. In general, who are bound by or entitled to rights under a contract?

471. What is meant by the statement that a contract can-

not impose liability upon a third party? Give the facts and the legal principle involved in the case of Lumley v. Gye; in Bowen v. Hall. Are these cases followed in the United States?

472. Discuss whether or not a contract can confer rights on a third party.

473. Can a contract be assigned? If so, how?

474. What exceptions are there to the rule that the liabilities under a contract cannot be assigned?

475. What were the limitations at Common Law upon the right to assign rights under a contract?

476. How were rights under a contract assignable in equity?

477. Discuss the assignment of rights under a contract as authorized by statute? May a suit be maintained in the name of the assignee?

478. Discuss how rights and liabilities under a contract may be transferred by operation of law. Explain what is meant by "covenants that run with the land." What is the effect of the death or bankruptcy of a party to a contract, as regards the passing of his rights and liabilities to his representative or heir?

CHAPTER IV.

THE INTERPRETATION OF CONTRACT.

479. Explain what is meant by the interpretation of a contract.

480. When is the interpretation of a contract a matter of law? What exceptions are stated by Anson to the rule excluding parol evidence from varying the terms of a written contract?

481. Discuss what evidence is admissible to show the existence of a document.

482. What may be shown to invalidate a written agreement, or prove that there never was a valid agreement?

483. Under what heads is evidence admissible to vary the terms of a written contract?

484. Discuss and give examples of supplemental or collateral terms that may be added to a written agreement; cases

requiring explanation of terms; cases introducing a custom or usage, and to correct a mutual mistake.

485. Discuss rules of construction. How is the intention of the parties to be ascertained? How are terms to be construed? What may be said as to time being of the essence of the contract?

CHAPTER V.

THE DISCHARGE OF CONTRACT.

486. In what different ways may the discharge of a contract be effected?

487. What different forms of discharge by agreement are mentioned by Anson?

488. Discuss discharge by waiver.

489. What is meant by a "substituted agreement?" Give an example.

490. What is meant by a condition subsequent.

491. What is the general rule as regards the form in which a contract may be discharged by agreement? How is this rule modified?

492. Discuss discharge of contract by performance. What is said in regard to payment as a method of discharge by performance? Explain payment and tender and the requisites of each.

493. What is said in regard to discharge of contract by breach? Do all breaches operate to discharge the contract?

494. In what three ways may a breach of contract occur? Does the method of the breach aid in determining whether the contract is discharged or not by the breach? What is the rule if the breach results from a renunciation of liability before performance? If the party makes it impossible to perform the contract, what is the effect? What is the rule if there is a partial or total failure to perform a promise without an open expression of intention to abandon the contract?

495. In what different ways may a promise be independent? Explain each.

496. How are conditional promises divided as regards time of performance? Define and explain conditions concurrent; conditions precedent. If a condition precedent is not essential to the contract what is it called? Does it discharge the contract?

497. Discuss the remedies for a breach which discharges the contract. What is the general rule as to the amount of damages which may be recovered for a breach? What is meant by "specific performance?"

498. How is the right of action arising from breach discharged?

499. Discuss discharge by impossibility of performance, and the exceptions to the general rule.

500. Discuss the discharge of contract by operation of law. What is essential to merge a simple contract into a different security? What constitutes a spoliation of a deed or instrument in writing?

PARTNERSHIPS.

CHAPTER I.

OF THE FORMATION OF PARTNERSHIPS.

501. What may be said of the history and origin of partnerships and partnership law? How were the rules of the Common Law regarding joint ownership enlarged?

502. Mention some of the English and American writers on the subject of Partnership.

503. Into what three divisions does the subject naturally divide itself?

504. Define a partnership. What is meant by "the firm?" What is the difficulty in getting an accurate definition of the subject?

505. What is necessary to create a partnership?

506. What is necessary to constitute a valid agreement to form a partnership? May the agreement be implied?

507. What is meant by the statement that the agreement must be executed?

508. Discuss when a partnership begins. How and by whom is the question of the existence of a partnership determined? Upon whom is the burden of proof?

509. In general, who may become partners? Who, in general, are incompetent to become partners? When may a corporation become a partner?

510. Name and define the various sorts of partners.

511. Name and define the various sorts of partnerships.

512. For what purposes may partnerships be formed? Was land a proper subject of partnership dealings at Common Law? What may be said in regard to a mining partnership? Can a valid partnership be formed for a purpose which is illegal or opposed to public policy?

513. Discuss the tests by which it may be determined whether or not a partnership exists between the parties. What is meant by a partnership as to third persons?

514. When will a partnership be implied, though the partners deny that a partnership was intended? Will the mere sharing of profits constitute the parties partners? Give reason for your answer. Is the presumption in favor of or against an implied partnership? Why? Mention some examples of co-owners who are held not to be partners.

515. What two grounds formerly existed for the establishment of a quasi-partnership, or a partnership as to third persons? What leading English case overruled one of the grounds? What is meant by "holding out," and in what ways may it occur? What is necessary to bind a person as a partner by holding out? What is the position of the person held out as a partner as to third persons; as to the alleged co-partners?

516. Define and explain what is meant by a "sub-partnership." What is the position of the sub-partner?

517. Discuss the formation of a partnership as a result of attempted incorporation. What general rule is laid down by Professor Mechem to test the status of persons who have attempted incorporation?

CHAPTER II.

PRINCIPLES REGULATING PARTNERSHIP DURING EXISTENCE.

518. What is meant by partnership capital? How is it secured, and of what may it consist? What significance have the contributions of the partners as respects profits and losses? What theories prevail as regards the capital of the firm?

519. May real estate be held in the firm name? Why? When will real estate be considered firm property?

520. Can a partner who holds the title to firm land pass a good title? To whom does firm real estate descend on death of a partner?

521. When may firm real estate be treated as personalty?

522. What is the general nature of the partners' title to firm property? Mention some of the results of the partners being co-proprietors of the firm property.

523. Do the partners have exemptions out of firm property? Any exceptions?

524. What is the purpose of a firm name? What gives it value as property? What becomes of it upon dissolution?

525. What is meant by "good-will?" Does it belong to the business or the place? What becomes of it on dissolution?

526. What may be said as to the implied powers of partners? How are the implied powers derived?

527. Discuss the extent of the partners' implied powers. What is included in the scope of the business? How is the scope of the business usually determined?

528. Give some instances of what partners may do in reference to the partnership business; instances of what the partner cannot do. When may a partner sign negotiable paper for his firm? What is the partner's authority to buy and sell firm property? Can he bind the firm by an instrument under seal?

529. What, in general, is the power of a majority? What cannot be done by the majority?

530. Discuss the rights and duties of partners as between themselves. What may be said as to the right of the partner to have firm property applied to firm debts? Of the creditors? When may a partner enforce contribution from co-partners?

531. What is the nature of the partners' liability on firm contracts? Why must actions against partnerships, in the absence of statutes, be brought against all the partners? What is the effect of a judgment against one partner on a firm debt? How have the statutes modified this rule?

532. To what extent is each partner liable for firm debts? Why? May an execution in name of a single partner be levied on firm property? Or one against the firm on partner's individual property?

533. How does the firm become liable for torts committed by its partners or agents? To what extent may a partner bind the firm for his tortious acts?

534. Is the liability for firm torts joint or several?

535. Discuss actions by and against a firm. Who should be made plaintiffs when the partnership sues? When it is sued who should be made defendants? Do the statutes in your State permit suits in the firm name? If so, what prerequisites to bringing suit in firm name?

536. Discuss actions between partners. Why can they not usually be brought at law? Can one firm sue another when there is a partner common to both firms? Why?

537. Discuss suits between partners in equity. When will the equity court grant an injunction or appoint a receiver?

CHAPTER III.

PRINCIPLES BY WHICH THE BUSINESS IS WOUND UP.

538. In general, how may a partnership be dissolved?

539. Discuss dissolution by act of the parties.

540. What events cause dissolution by operation of law? When will dissolution be decreed in equity? May a firm be continued by agreement after the death of a partner?

541. Discuss the necessity of dissolution notice. To whom must notice be given, and of what character? What is the rule as to dormant partners giving notice of their retirement from a firm? When is the partnership dissolved?

542. What is the effect of dissolution? Discuss fully. On the death of a partner who has authority to wind up? What is the effect of an agreement between partners to release a retiring partner, as to third persons, and as to themselves?

543. What is meant by the partners' equitable lien? Against whom does it exist, and to what property does it extend? How may it be lost? What power have the partners to dispose of firm property while the firm is running and solvent?

544. Discuss the final accounting. Where should it begin? Where end? When is the intervention of the equity court necessary?

545. What is the general method followed in accounting? What is the order followed in distributing the assets of the firm? Discuss firm debts. Can partners compete with firm creditors? Give reasons for answer. What priority have the firm creditors in partnership property? When have separate

creditors a priority in the partner's individual property? Discuss the settlement of accounts between partners in winding up. What rules govern when there has been only a partnership as to third persons? Where there is a dormant partner?

546. Discuss the liability of partners to meet the losses. How are losses of capital made up?

547. What may be said concerning the action for an accounting? How is the action barred? For what reasons may an accounting be opened?

548. What is meant by a limited partnership? What purposes does it answer? Can a limited partnership be formed in the absence of statutes permitting it?

549. What, in general, are the statutory requirements for the formation of a limited partnership? Must these be strictly followed? What is the effect of not observing the statute?

550. Discuss limited partnership associations. What additional statutory requirements to those of limited partnerships? What is the effect of failing to observe the statutory requirements?